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IN THE

Supreme Court of the United States

October Term, 1991

JOSEPH R. DILEO, MARY A. DILEO,
WALTER E. MYCEK, JR., MICHELE A. MYCEK
and ARCELO REPRODUCTION COMPANY, INC.

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), this Court held that the government's attorneys who handle civil cases cannot receive disclosure of *"grand jury materials"* without an order from the District Court pursuant to Rule 6(e), Federal Rules of Criminal Procedure. The question presented here is whether bank records that are received by a federal grand jury pursuant to a subpoena *duces tecum* may be disclosed to the government's attorneys who handle civil cases, without an order from the District Court pursuant to Rule 6(e), based on a conclusion that such bank records do not constitute *"matters occurring before the grand jury"* within the meaning of Rule 6(e).

2. If bank records that were obtained pursuant to federal grand jury subpoenas *duces tecum* may not be disclosed to the government's attorneys who handle civil cases without a 6(e) order, and if such records are disclosed to Internal Revenue Service attorneys in violation of this Rule, whether such bank records must be suppressed from use in a civil trial.

3. Whether a special agent of the Internal Revenue Service who is designated by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law, under Rule 6(e)(3)(A)(ii), and who, therefore, may not disclose grand jury material, may, consistent with that role, also serve as the employee or officer of the Internal Revenue Service who is designated as the Internal Revenue Service's "representative" or as its "essential person" for the presentation of its civil case under Tax Court Rule 145 (a) and Federal Rule of Evidence 615.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Joseph R. DiLeo, Mary A. DiLeo, Walter E. Mycek, Jr., Michele A. Mycek, and Arcelo Reproduction Company, Inc. respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. *infra*, 2A-11A) is reported at 959 F.2d 16 (1992). The opinions of the United States Tax Court (App. *infra*, 18A-54A, 66A-80A) are reported at 96 T.C. No. 42 (1991) and T.C. Memo 1989-540 (1989). The opinion and Order of the District Court (App. *infra*, 57A-63A) were not published.

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* Arcelo Reproduction Company, Inc. never had a parent or subsidiary company.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1992. (App. *infra*, 2A.) A timely petition for rehearing was filed April 3, 1992, and denied April 28, 1992. (App. *infra*, 1A.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

AUTHORITIES INVOLVED

Federal Rules of Criminal Procedure. (Hereafter "F.R.Cr.P.")
Rule 6(e)

* * *

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with these rules. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosures otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph A (ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

* * *

Federal Rules of Evidence

Rule 615 Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Tax Court Rules of Practice and Procedure

(Tax Court Rule 145 (a) is identical to Federal Rule of Evidence 615.)

STATEMENT

The Grand Jury Investigation

Petitioners Walter E. Mycek, Jr. and Joseph R. DiLeo were subjects of a federal grand jury investigation that began in 1980. Special Agent Philip B. Kirschen of the Internal Revenue Service ("I.R.S.") was "deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law" under Rule 6(e)(3)(A)(ii), F.R.Cr.P. In that capacity, Kirschen had access to secret grand jury material and was required to maintain that secrecy. During the grand jury investigation, three banks produced records of petitioners' bank accounts pursuant to grand jury subpoenas. (App. *infra*, 58A, 68A.) When the grand jury investigation ended, the United States Attorney's Office abandoned control of the grand jury records to Kirschen. (App. *infra*, 58A, 72A.)

The Unauthorized Removal of the Grand Jury Records

The grand jury investigation was concluded in March, 1985, and the bank records no longer were needed for criminal purposes as of July 1985, when DiLeo was sentenced. (App. *infra*, 58A, 72A.) Kirschen then boxed up the records, which had been kept in the United States Attorney's Office in New York City, and transported the records to his I.R.S. office in Newburgh, New York. Kirschen did not possess an order pursuant to Rule 6(e) authorizing disclosure of the grand jury records and was not aware whether one had been obtained. Kirschen then sealed the records in the boxes and, in July, 1985, sent the records to the Federal Building in Albany, New York. (App. *infra*, 58A-59A, 72A, 87A.)

The I.R.S. District Counsel attorneys who would represent the Commissioner in any subsequent civil proceeding in the Tax Court maintain their office in that Federal Building. The purpose for storing the records in Albany, as opposed to the normal storage center in Newark, New Jersey, was so they could be used by the I.R.S. District Counsel in subsequent civil proceedings. When the records were sent to Albany, there was no 6(e) order issued by the District Court, and the Assistant United States Attorney in charge of the grand jury investigation was not consulted. (App. *infra*, 59A, 87A-89A.) Kirschen did not communicate with the banks that had produced the records in response to grand jury subpoenas. He

believed he did not need the banks' consent in order for him to retain the records after the grand jury investigation was concluded because he believed that the government owned the records. (App. *infra*, 89A.)

The Proceedings in the United States Tax Court

In March 1986, the Commissioner issued statutory notices of deficiency pertaining to the taxes of Mr. and Mrs. Mycek for 1978 through 1981 and to the taxes of Mr. and Mrs. DiLeo for 1978 through 1982. In March, 1987, the Commissioner issued a third deficiency notice pertaining to Arcelo's taxes for 1978 through 1982. The three notices asserted tax deficiencies and civil penalties. All petitioners filed timely Petitions in the Tax Court, and their cases were consolidated for trial. (App. *infra*, 3A.)

During the discovery stages of the Tax Court proceeding, in the summer and fall of 1987, the I.R.S. attorneys refused to provide petitioners with certain bank records petitioners requested. The I.R.S. attorneys contended that those bank records were "matters occurring before the grand jury" and that a 6(e) order was required to authorize their disclosure. (App. *infra*, 59A-60A, 79A-80A, 91A-92A.) The I.R.S. attorneys did not assert as a defense to disclosure to petitioners that the I.R.S. did not possess the records.

On December 7 and 8, 1987, the I.R.S. served trial subpoenas upon the three banks that had produced the bank records for the grand jury. The subpoenas required those banks to produce the same bank records that they previously had produced for the grand jury years earlier, but which Kirschen had not returned to the banks. (App. *infra*, 4A, 58A-59A, 74A.) In a letter dated December 21, 1987, one bank purported to authorize the I.R.S. "to obtain these records [from the grand jury] to facilitate your subpoena . . ." In another letter dated December 21, 1987, a second bank purported to authorize the I.R.S. "to review these documents" (App. *infra*, 94A, 95A.) The third bank did not respond until January 4, 1988.

On December 22, 1987, at the request of the I.R.S. District Counsel, Kirschen travelled to Albany, removed the bank records of all three banks from the box that had been placed there in July, 1985, and caused those records to be delivered to District Counsel. (App. *infra*, 4A, 59A, 74A.) Kirschen also prepared an inventory of the records for District Counsel. (App. *infra*, 74A-75A, 84A.) Kirschen did not first consult with the United States Attorney's Office nor was he aware whether an order pursuant to Rule 6(e)

was in effect at the time he made the grand jury records available to District Counsel. (App. *infra*, 90A.) No 6(e) order was then in effect. (App. *infra*, 59A.) Kirschen left the records from all three banks with an I.R.S. secretary on December 22, 1987 (App. *infra*, 92A.) The letters from the banks dated December 21, 1987, were received by District Counsel on December 23 and 24, 1987, respectively. (App. *infra*, 75A, 94A, 95A.)

Later, by letter dated January 4, 1988, the third bank purported to give its "consent and permission to the I.R.S. to obtain the records [the bank] already produced to the Grand Jury in the Southern District of New York in response to a Grand Jury subpoena." The bank stated that it was its "understanding that the records were to be returned to Chase at the conclusion of the Grand Jury proceedings, but this has not yet occurred." (App. *infra*, 96A.)

The I.R.S. District Counsel attorneys obtained the grand jury materials from Kirschen solely on the basis of their own authority. The I.R.S. attorneys then examined the bank records and later disclosed the records to petitioners' counsel on January 6, 8, and 11, 1988, without a 6(e) Order authorizing disclosure to District Counsel or to petitioners' counsel (or to anyone else). (App. *infra*, 4A, 59A-60A, 75A.)

Kirschen previously had been the person who was "deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law" under Rule 6(e)(3)(A)(ii), F.R.Cr.P. (App. *infra*, 4A, 58A, 68A.) At the Tax Court trial, on January 21, 1988, Special Agent Kirschen served as the employee or officer designated as the I.R.S.' "representative" or as its "essential person for the presentation" of the I.R.S.' case. *See*, Rule 145 of the Tax Court Rules; see also Rule 615 of the Federal Rules of Evidence). (App. *infra*, 53A.)

At the trial, respondent disclosed to the Tax Court the bank records that the grand jury had obtained from the three banks by offering them in evidence. Petitioners objected to disclosure of these records to the Tax Court and moved to suppress the records on grounds that the records were obtained in violation of Rule 6(e), as there was no court order from the District Court. (App. *infra*, 4A, 60A, 75A.)

Petitioners' objection also was on grounds that respondent was judicially estopped from arguing that the bank records were not "matters occurring before the grand jury" and, thus, not within the secrecy requirement of Rule 6(e)(2), as respondent previously had resisted petitioners' attempt to obtain discovery of similar bank records by arguing that the records that petitioners requested were matters occurring before the grand jury for which a court order was required. (App. *infra*, 5A, 59A-60A, 79A-80A.)*

At the trial, on January 21, 1988, petitioners attempted to inquire of Kirschen as to the contents of the other bank records that District Counsel had deemed to be "matters occurring before the grand jury." Kirschen refused to answer on the basis of Rule 6(e). (Trial Transcript 62-63.)

A hearing on the suppression issues took place February 29, 1988. (App. *infra* 81A.) On September 28, 1989, the Tax Court ruled (T.C. Memo 1989-540) that the bank records obtained from the grand jury without a 6(e) order from the District Court are admissible and that an order from the District Court is not required as the bank records are not "matters occurring before the grand jury" within the meaning of Rule 6(e). (App. *infra*, 66A-80A.) The Tax Court also held that the I.R.S. was not estopped from arguing that the bank records are not matters occurring before the grand jury after it had previously argued that similar bank records are matters occurring before the grand jury and that an order from the District Court was required. (App. *infra*, 80A.)** The Tax Court ordered the parties to submit briefs addressing the substantive trial issues by December 12, 1989. (App. *infra*, 65A.)

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* The Tax Court and the Court of Appeals ruled that District Counsel did not possess these similar records, and, consequently, could not disclose them to petitioners because Kirschen did not provide them to District Counsel. (App. *infra*, 9A-10A, 79A-80A.) However, District Counsel's discovery response invoked Rule 6(e) as a defense to disclosure and did not assert lack of possession as a reason for withholding the bank records from petitioners.

** The courts below rejected petitioners' judicial estoppel claim because petitioners did not take steps of their own to obtain the other bank records. (App. *infra*, 9A-10A, 79A-80A.) However, this does not address petitioners' argument that respondent may not take inconsistent positions regarding the nature of bank records depending on which party wants them.

The Proceedings in the District Court

On November 21, 1989, petitioners filed an action in the District Court in which they sought to enjoin the I.R.S. attorneys from making further disclosures of grand jury material in their Tax Court briefs and requested that the District Court order the I.R.S. attorneys to file a motion in the Tax Court requesting that the grand jury documents be withdrawn from evidence and returned to the District Court. (App. *infra*, 5A, 60A.)

On July 9, 1990, the District Court denied respondent's motion to dismiss the Complaint. (App. *infra*, 60A.) On August 23, 1990, the District Court ruled that the Tax Court had no authority to rule that the documents it received in evidence are not grand jury materials. (App. *infra*, 60A-62A.) Later, in a Memorandum Decision amplifying its ruling, the District Court called the actions of the United States Attorney and the I.R.S. attorneys an "egregious disregard of the obligations of the Government under Rule 6(e)." (App. *infra*, 57A, 62A.) In its decision of August 23, 1990, the District Court ruled:

> "no matters or documents that were before the Grand Jury or that were subject to Grand Jury supboena may be considered in the tax court proceeding. And all such documents will be returned to the custody of the United States Attorney." (App. *infra*, 61A.)

However, the District Court also stated that it will entertain an application for the release of particular documents. (Id.)

On September 6, 1990, the government made an application for an Order "authorizing the use of certain pre-existing documents obtained by grand jury subpoena in a civil action pending before the United States Tax Court at docket numbers . . ." (App. *infra*, 57A, 61A, 63A.) The government did not apply for *disclosure* of documents, but rather for the *use* of documents; and the government did not specify particular documents, but referred to "certain pre-existing documents." The government did not attempt to make a showing of particularized need for the documents. Instead, the government argued that the documents are not "matters occurring before the grand jury" within the meaning of Rule 6(e), F.R.Cr. P., and, therefore, no showing of particularized need is required.

On September 13, 1990, plaintiffs filed a memorandum opposing the application on grounds that the initial illegal disclosure required that the documents be suppressed and that, in any event, the documents do come within Rule 6(e) for which reason a showing of particularized need is required according to *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983).(App. *infra*, 62A.) On September 24, 1990, the District Court issued an Order "authorizing the use of certain pre-existing documents obtained by grand jury subpoena in [the] civil action pending before the United States Tax Court." (App. *infra*, 62A-63A.) This Order retroactively authorized the "use" of the documents that Kirschen had previously disclosed to the I.R.S. civil lawyers in December, 1987 and that the I.R.S. lawyers had disclosed to the Tax Court in January, 1988.

The court later stated that it had granted the government's application "reluctantly." (App. *infra*, 57A.) The only reason the District Court offered for granting the "belated" 6(e) application despite the "egregious" violations of the Rule was that the records do not constitute "matters occurring before the grand jury" and, therefore, are not within the secrecy requirements of Rule 6(e). The District Court did not discuss the suppression issue petitioners raised. (App. *infra*, 57A-62A.) The District Court served a copy of its Order and its Memorandum Decision upon the Tax Court. (App. *infra*, 56A, 62A, 64A.)

Proceedings in the Court of Appeals

Petitioners filed a timely notice of appeal from the District Court's retroactive Order. The parties then entered into a stipulation, which was approved by the Court of Appeals on January 14, 1991. The stipulation provided that the appeal would be dismissed voluntarily "without prejudice to consideration of the issues presented in this appeal as part of an appeal from the decision of the Tax Court." (App. *infra*, 5A.)

Thereafter, the Tax Court rendered its Memorandum Opinion on June 24, 1991, concerning the substantive trial issues. 96 T.C. No. 42. In its opinion, the Tax Court relied heavily upon the grand jury material. (App. *infra*, 18A-54A.) The Tax Court did not purport to derive authority for the use of this material from the District Court's Order. The Tax Court did not mention the District Court's Order, but it did cite its own earlier Opinion of September 28, 1989 in which it had ruled that an Order from the District Court

is not required. (App. *infra*, 30A.)

Petitioners appealed from the judgments of the Tax Court. In their appeal, petitioners also raised the issues preserved for appeal from the Order of the District Court pursuant to the stipulation of January 14, 1991.

On March 20, 1992, the Court of Appeals ruled that an order from the District Court was not required for disclosure of bank records because the bank records are not "matters occurring before the grand jury" within the meaning of Rule 6(e), and, therefore, do not come within the requirements of Rule 6(e)(3)(C)(i). In arriving at this decision, the Court of Appeals relied solely upon its earlier ruling in *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960). (App. *infra*, 6A-9A.) In *Interstate Dress*, the Second Circuit interpreted "matters occurring before the grand jury" not to encompass third-party records obtained by a grand jury where such records are sought for their intrinsic value and do not reveal what took place before the grand jury.

Accordingly, the Court of Appeals affirmed the judgments of the Tax Court holding that an order from the District Court under Rule 6(e) is not required for the disclosure of bank records obtained through a grand jury subpoena *duces tecum*. (App. *infra*, 8A.)

Based on its ruling that a 6(e) order is not required, the Court of Appeals held that it is not necessary to consider the suppression issue and whether a 6(e) order issued in 1990 could authorize disclosures that had occurred in 1987 and 1988. (App. *infra*, 10A.)

The Court of Appeals also ruled that it is permissible for an agent who received disclosures from a grand jury under Rule 6(e)(3)(A)(ii) to also serve as the Commissioner's "representative" or as his "essential person" at a civil trial under Federal Rule of Evidence 615 and under Tax Court Rule 145. (App. *infra*, 10A.)

REASONS WHY THE WRIT SHOULD ISSUE

I.

BANK RECORDS THAT ARE OBTAINED THROUGH A GRAND JURY SUBPOENA ARE MATTERS OCCURRING BEFORE THE GRAND JURY WITHIN THE MEANING OF RULE 6(e), AND AN ORDER FROM THE DISTRICT COURT IS REQUIRED BEFORE SUCH RECORDS MAY BE DISCLOSED FOR USE IN CIVIL TRIALS

A

The writ should issue because the Court of Appeals decided the case in a way that conflicts with the decision of this Court in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), and with two other decisions of this Court subsequent to *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960). The Court of Appeals' decision also is contrary to the 1977 amendment to Rule 6(e). These authorities nullify *Interstate Dress* as it applies to documents obtained pursuant to a federal grand jury subpoena. Furthermore, because the documents in this case consist of bank records, the decision of the Court of Appeals also is contrary to two statutes enacted by Congress subsequent to *Interstate Dress*.

The Writ also should issue because the decision of the Court of Appeals conflicts with the decision of another court of appeals, *i.e.*, *In Re Grand Jury Proceedings*, 851 F.2d 860 (6th Cir. 1988), and with a dictum in a decision of the Second Circuit. *In Re Rosahn*, 671 F.2d 690, 695 (2d Cir. 1982).

While other courts of appeals seemingly approve the analysis employed by the Second Circuit in this case (which inquires whether the grand jury materials in question are sought for their intrinsic value and not to ascertain what took place before the grand jury), none of these courts of appeals ever has approved a disclosure of grand jury materials without an order from the District Court and based solely on the approval of I.R.S. District Counsel attorneys.

B

This Court held in *United States v. Sells Engineering, Inc.*,

463 U.S. 418 (1983), that "attorneys for the government" who work on civil cases for the Department of Justice are not entitled to automatic disclosure of "grand jury materials" under Rule 6(e)(3)(A)(i), as are "attorneys for the government" who work on criminal matters for the Department of Justice. Instead, such civil attorneys for the government must proceed under Rule 6(e)(3)(C)(i), and obtain an order from the District Court upon a showing of particularized need, in order to obtain disclosure of "grand jury materials." 463 U.S. at 442.

Thus, it has been clear since 1983, that "attorneys for the government" performing civil duties are not entitled, under Rule 6 (e)(3)(A)(i), to automatic disclosure of "grand jury materials." *Sells Engineering* specifically excluded Justice Department civil attorneys, even though such attorneys are "attorneys for the government." *See*, Rule 54(c), F.R.Cr.P.

In this case, the I.R.S. District Counsel attorneys who obtained disclosure of grand jury materials from Kirschen without a court order are not even "attorneys for the government," as that phrase is used in Rule 6(e)(3)(A)(i). *See*, Rule 54 (c), F.R.Cr.P. Therefore, their ineligibility to obtain disclosure of grand jury materials without an order from the District Court was clear even before *Sells* because they do not even arguably come within the language of the Rule, as Justice Department civil attorneys do. *See*, 463 U.S. at 442, n. 34. The government conceded in its argument in *Sells* that agency attorneys are not entitled to receive automatic disclosure, and this Court accepted that proposition, 463 U.S. at 442, note 34, and at 426, note 8, as did the dissenting opinion in *Sells*. *Id.* at 447-48, and note 1. It never was contended that agency attorneys could have automatic disclosure of grand jury materials.

To support the right of the I.R.S. attorneys to obtain grand jury material without a court order, the government argued below that the bank records involved herein do not disclose what took place before the grand jury and are sought for their intrinsic value and, therefore, may be disclosed without a court order. This argument is rooted in the Second Circuit's opinion in *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960). However, due to several judicial and legislative developments subsequent to the decision in *Interstate Dress*, the rationale upon which that standard was based has been nullified.

The most obvious reason is the addition of new language to the Rule in 1977. An amendment of Rule 6(e) that year provides that government personnel who assist an attorney for the government and to whom matters are disclosed under Rule 6(e)(3)(A)(ii) "shall not utilize *that grand jury material* for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law." (Rule 6(e)(3)(B)). (Emphasis added.)

The sole basis for the Court of Appeals' ruling in this case was *Interstate Dress*. However, that case pre-dates the 1977 amendment and the addition of the phrase "grand jury material," and it only purports to interpret the phrase, "matters occurring before the grand jury," which was perceived to have a restrictive special meaning. As will be shown below, the new phrase, "grand jury material," was added specifically to preclude the sort of disclosure that occurred herein, and the Justice Department's interpretation of even the pre-amendment Rule was that agency attorneys could not have access to "grand jury developed evidence" without a court order. The I.R.S. lawyers clearly obtained "grand jury material" from Kirschen contrary to Rule 6(e)(3)(B).

Since 1977, the phrase, "matters occurring before the grand jury" has been given no special or restrictive meaning by Congress or by this Court, and every indication has been that this phrase has no meaning apart from "grand jury material." The Rule, as amended in 1977, equates "grand jury material" with "matters . . . disclosed under subparagraph (A)(ii)." Rule 6(e)(3)(B) refers to "that grand jury material." The antecedent to which "that" refers is matters . . . disclosed under subparagraph (A)(ii)." "Matters . . . disclosed under subparagraph (A)(ii)" clearly is a reference to "matters occurring before the grand jury." *See*, Rule 6(e)(3)(A)(ii). The special meaning given the latter phrase by the Second Circuit is now obsolete because both phrases ("matters occurring before the grand jury" and "grand jury material") are used as synonyms in the Rule as amended in 1977.

In *Sells Engineering*, this Court held that a Rule 6(e)(3)(C)(i) Order is required for disclosure "of grand jury materials" to the government's attorneys in civil cases. This Court specifically referred to "grand jury materials" 43 times in its opinion in *Sells*, 463 U.S. at 420, 421, 422 and n. 6, 426, 427, 429 and n. 11, 430,

431, 433, 434 n. 19, 435, 436, 437, 438, 439, 440, 442, 443, 444, 445. The Court referred to "grand jury material" when it stated the issue for review, *id.* at 420, as well as when it announced its holding and conclusion. *Id.* at 427, 442. Only one time did the Court use the phrase "matters occurring before the grand jury" and that was when it paraphrased part of the Rule. *Id.* 425. Thus, clearly, documents and exhibits before a grand jury were viewed as grand jury materials to the same extent as transcripts of testimony (and anything else that reveals what took place before the grand jury) when this Court barred Justice Department civil attorneys from obtaining them without a (C)(i) Order.

That "matters occurring before the grand jury" has no special meaning apart from "grand jury materials" and that both phrases contemplate documents considered by a grand jury, whether or not such documents reveal what took place in the grand jury, also is made clear by decisions of this Court other than *Sells* and by legislation other than the 1977 amendment to Rule 6 (e), all of which are subsequent to *Interstate Dress*. In *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987), this Court ruled that disclosure of grand jury material for civil use to attorneys for the government who previously had access to the same material during a criminal investigation they conducted was authorized without an order under Rule 6(e)(3)(C)(i). In *Doe I*, the Court referred to the information therein as "materials" and as "documents" more than a dozen times. If the government or the Court in *Doe I* considered that documents that are sought for their intrinsic value were exempt from the need for a disclosure order under Rule 6 (e), the case could have been resolved much more easily on that basis. The government did not raise the *Interstate Dress* argument in *Doe I* or *Sells*.

The assumptions in *Doe I* and in *Sells* that mere documents that are obtained by grand jury subpoena fall within Rule 6(e) both as "matters occurring before the grand jury" and as "grand jury material" to the same extent as grand jury testimony derives from the 1977 amendment to Rule 6(e). As this Court noted in *Sells*, the Senate relied on an assurance from the Justice Department that the proposed (and subsequently adopted) amendment was intended to prevent agency attorneys from having unrestrained access to grand jury "materials." 463 U.S. at 438-39. The Senate was also informed

by then Deputy Attorney General Thornburgh that federal prosecutors are given a free hand concerning the use of grand jury material, "but disclosure of *grand jury developed evidence* for civil law enforcement purposes requires a (C)(i) order." Id. at 441-42. (Emphasis added.) Referring to this testimony, this Court observed in *Sells Engineering*, "The rest of the legislative history [of the 1977 amendment] is consistent with the view that *no* [emphasis in original] disclosure of *grand jury materials* [emphasis added] for civil use should be permitted without a court order. [footnote omitted]" Id. at 440.

Subsequent to the 1977 amendment, this Court considered a case that presented the question, "what court should assess the strength of the showing [of the justification for disclosure], the court where the civil action is pending, or the court that acts as custodian of the grand jury *documents*." *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 213 (1979). (Emphasis added.) If a court order were not required for disclosure of mere documents, which are sought for their intrinsic value and which do not reveal what took place before the grand jury, this Court would not have needed to decide which court should assess whether such documents may be disclosed.

Accordingly, it is clear that the view expressed by the Second Circuit in *Interstate Dress* (and in the present case) no longer was the view of the Justice Department in 1977, or of Congress in 1977, or of this Court in 1979 or in 1983. If mere documents, which are sought for their intrinsic value and not to learn what occurred before the grand jury, were subject to disclosure without an order from the District Court pursuant to Rule 6(e)(3)(C)(i), then *Sells* would apply only to grand jury testimony and, perhaps, to exhibits specifically prepared for the grand jury. Third party documents, which were prepared outside the grand jury and subpoenaed by the grand jury, would then be available to government agency attorneys (and to private litigants as well) without supervision from the District Court. This is contrary to the 1977 amendment to Rule 6(e), to Congress's assumptions and the Justice Department's assurance in 1977, and to the assumptions of this Court in *Douglas Oil*, *Sells Engineering*, and *Doe I*.

C

The reason for requiring authorization from the District Court before "grand jury developed evidence" may be disclosed for civil purposes is clear. It is to prevent grand jury abuse, such as may occur when the I.R.S. or other government agencies prevail on federal prosecutors to use the compulsion of grand jury subpoenas not for grand jury purposes, but rather for agency purposes, where the agency does not possess equivalent compulsion powers. *John Doe, Inc. I*, 481 U.S. at 114-115; *Sells Enginering, Inc.*, 463 U.S. at 432-34.

Those courts of appeals that have followed the rationale of *Interstate Dress Carriers* have done so after reviewing only those five considerations for grand jury secrecy that were defined by this Court in 1958 (*see United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n. 6 (1958)), or a similar formulation. The courts of appeals did not consider an additional consideration, i.e. deterring potential grand jury abuse, as noted in this Court's decisions (*Doe I*, 481 U.S. at 114-115, and *Sells*, 463 U.S. at 432-33) subsequent to *Interstate Dress*. *See, e.g., United States v. Phillips*, 843 F. 2d 438, 441 (11th Cir. 1988); *Anaya v. United States*, 815 F.2d 1373, 1379 (10th Cir. 1987); *In The Matter of Special March 1981 Grand Jury, Appeal of Almond Pharmacy, Inc.*, 753 F.2d 575, 578-79 (7th Cir. 1985); *United States v. Stanford*, 589 F.2d 285, 290-291 (7th Cir. 1978).

The one court of appeals that did consider the need to deter potential grand jury abuse and to prevent the grand jury's coercive powers from being used for purposes of agency civil discovery is the Sixth Circuit. *In Re Grand Jury Proceedings*, 851 F2d 860 (6th Cir. 1988). In that case, the court recognized the "extraordinary coercive powers of the grand jury to compel the production of confidential information" and remanded a case to the District Court for consideration of this factor. *Id.* at 865. The Sixth Circuit derived this concern from this Court's decisions in *Sells*, 463 U.S. at 432-33, and *Doe I*, 481 U.S. 114-15. 851 F.2d at 846. The Sixth Circuit relied upon statements in those cases in which this Court identified three types of dangers involved in disclosure of grand jury information to government attorneys for uses related to civil proceedings, including the possible subversion of the limits otherwise placed on the government's investigative and discovery powers in the civil

context. *Id.*

Thus, the Sixth Circuit, the only court of appeals to address the concerns articulated by this Court after the decision of the Second Circuit in *Interstate Dress*, arrived at a conclusion that conflicts with that of the Second Circuit in this case and with the decisions of those courts of appeals that have analyzed disclosure only in terms of the five *Procter & Gamble* considerations that predate *Interstate Dress*.

D

Petitioners contend that the rule of *Interstate Dress* no longer is viable after *Douglas Oil* and *Sells*. However, petitioners additionally contend that, even if *Interstate Dress* were still the law, it should not be implemented based on the determination of a civil attorney for a government agency. This court has recognized a need for court supervision of the disclosure in order to avoid abuse. *Sells*, 463 U.S., at 432; *John Doe Inc. I*, 481 U.S., at 114-15.

One can hardly imagine any more certain way to enable government civil attorneys to circumvent the intent of Rule 6(e) than by exempting from its scope all documents that are sought for their intrinsic value and do not reveal what took place before the grand jury. One certainly cannot imagine any more certain way to enable government civil attorneys to circumvent the intent of the Rule than to permit those attorneys to determine on their own what disclosures may be made under the latter standard, rather than requiring that the District Court make this determination. Yet this is precisely what occurred in this case. The I.R.S. District Counsel attorneys themselves determined that the bank records that they wanted to use are not "matters occurring before the grand jury" and that they could have access to those records without a 6(e) order from the District Court. They never considered whether the bank records constitute "grand jury material" that Kirschen is precluded from disclosing to them under Rule 6(e)(3)(B).

The District Court disagreed with the government's argument that I.R.S. lawyers can determine themselves whether records constitute matters occurring before the grand jury, but that court gave the attorneys a belated order that petitioners contend is not valid because it was issued three years after the disclosure occurred. How-

ever, the Tax Court ruled that an order from the District Court is not necessary, and the Court of Appeals upheld that ruling. The Court of Appeals relied solely on *Interstate Dress* for its support and did not address petitioners' arguments regarding the 1977 amendment to Rule 6(e) and *Sells*.

In *Interstate Dress*, the District Court did order a disclosure pursuant to Rule 6(e). In those cases that follow the rationale of *Interstate Dress*, the District Court did issue an order. This is the first time, to petitioners' knowledge, that a court of appeals has upheld a disclosure of grand jury materials to government agency attorneys based on the rationale of *Interstate Dress*, where the decision to make the disclosure was made solely by those government agency attorneys. The cases that do follow the rationale of *Interstate Dress* acknowledge that a court order is required for disclosure and use the *Interstate Dress* analysis only to determine whether the government may be excused from making a showing of particularized need.

If it were still the law, the rule of *Interstate Dress*, would render *Sells*, and its companion, *United States v. Baggot*, 463 U.S. 476 (1983), virtually meaningless. Just this Term, the Court stated that Rule 6(e) places "strict controls" on disclosure of matters occurring before the grand jury, citing *Sells*. *United States v. Williams*, _____ U.S. _____, 112 S. Ct. 1735, 1741, note 6 (May 4, 1992). The Court of Appeals' broad exception for third party records that it characterizes as not being "matters occurring before the grand jury" would swallow the Rule and eliminate any semblance of controls on disclosures of matters occurring before the grand jury. In numerous cases, federal prosecutors could issue grand jury subpoenas for the production of third party documents and turn those documents over to attorneys for government agencies, regardless of whether there also is a legitimate criminal investigation, and without aproval from a court.

E

Furthermore, as to bank records, in particular, *Interstate Dress* no longer can be valid following the enactment of the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. 3401-3422 (1978). By that statute, Congress established closely regulated procedures to prevent informal cooperation arangements between financial

institutions and the I.R.S., in which the financial institutions disclose bank records without proper process. *Neece v. Internal Revenue Service*, 922 F.2d 573, 573-574 (10th Cir. 1990). Because *Interstate Dress* permits disclosure of grand jury records upon the consent of the owners of the records in lieu of a court order, *Interstate Dress* is, in effect, overruled by the RFPA whenever the owner is a financial institution, as the 1978 legislation disables financial institutions from consenting to disclosure.

The RFPA clearly expresses Congressional intent that records such as those involved in the present case be covered by the secrecy requirements of Rule 6(e). The RFPA refers to use of "financial records about a customer obtained from a financial institution pursuant to a subpena issued under the authority of a Federal grand jury." 12 U.S.C. 3420 (a). Such *financial records*

> shall be used only for the purpose of considering whether to issue an indictment or presentment by that grand jury, or of prosecuting a crime for which that indictment or presentment is issued, or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure.

12 U.S.C. 3420 (a)(2). By providing for disclosure, in accordance with Rule 6(e), of "financial records," instead of "matters occurring before the grand jury," Congress in 1978 undoubtedly understood that financial records are matters occurring before a grand jury when such records are "obtained from a financial institution pursuant to a subpena issued under the authority of a Federal grand jury." Accordingly, the phrase can have no special meaning such as that given it by the Second Circuit.

Furthermore, a provision in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), P. Law 101-73, 103 Stat. 505, makes disclosure of "grand jury information" automatic without a 6(e) order for use in enforcing certain civil statutes, not including civil tax enforcement. 18 U.S.C. 3322(a). This legislation would not have been needed if Congress understood bank records to be exempt from Rule 6(e).

F

Based on all the foregoing reasons, it is clear that an order from the District court pursuant to Rule 6(e)(3)(C)(i) is necessary before government agency attorneys can receive disclosure of documents, and particularly bank records, that have been obtained through use of a grand jury subpoena. The Court of Appeals' decision to the contrary is based on a precedent that is obsolete in view of subsequent practices of and assurances by the Justice Department, in view of subsequent legislation, and in view of subsequent decisions of this Court.

The District Court's order of September, 1990, could not serve as the required 6(e) order as it only purported to authorize a "use" of documents and it did so three years after the documents were disclosed without a 6(e) order. In addition, that order is invalid because it did not specify the documents that could be used. Moreover, there was no attempt by the government to show a particularized need for the disclosure and no finding by the court of such a need.

II

GRAND JURY MATERIALS THAT ARE DISCLOSED TO THE GOVERNMENT'S CIVIL ATTORNEYS WITHOUT THE REQUIRED ORDER MUST BE EXCLUDED FROM USE IN THE CIVIL TRIAL

Even if the District Court's order of September, 1990 were not invalid for the foregoing reason, it should not have been issued without a suppression analysis by the District Court after that court concluded that Rule 6(e) had been "egregiously" violated. The purpose of the exclusionary rule would be served by suppressing the records because the law enforcement officers who authorized Kirschen to violate the rule (i.e., the I.R.S. lawyers) and the law enforcement officer who did violate the rule (Kirschen) are the same law enforcement officers who benefited from the violation. *See, United States v. Leon*, 468 U.S. 897 (1984); *United States v. Janis*, 428 U.S. 433, 455-56 (1976).

This Court previously held that dismissal of an indictment is not an appropriate remedy for grand jury abuse that occurs when prosecutors secure evidence for the benefit of their civil counterparts. *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). The remedy of contempt against the prosecutor is authorized, but is extremely unlikely to occur. Moreover, one of the reasons for denial of non-court ordered access for civil use is this Court's concern that such automatic access might encourage grand jury abuse, which would be very difficult to detect and prove. *Sells*, *supra*, at 432. Excluding evidence so obtained from use in civil proceedings is an appropriate remedy to deter potential grand jury abuse.

III

AN I.R.S. AGENT WHO IS DESIGNATED BY AN ATTORNEY FOR THE GOVERNMENT TO ASSIST THE ATTORNEY IN THE PERFORMANCE OF THE ATTORNEY'S DUTY TO ENFORCE FEDERAL CRIMINAL LAW, UNDER RULE 6(e)(3)(A)(ii), AND WHO RECEIVES ACCESS TO GRAND JURY MATERIAL BY REASON OF SUCH DESIGNATION MAY NOT, CONSISTENT WITH THAT ROLE, SERVE AS THE I.R.S.' REPRESENTATIVE OR AS ITS ESSENTIAL PERSON IN A CIVIL PROCEEDING

The Court in *Sells* left unanswered the question whether grand jury materials may be used for civil purposes by an attorney for the government who himself conducted the criminal prosecution. 463 U.S. at 431, note 15. This question was answered in *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987), where the Court permitted such attorneys to continue to use the grand jury material in the subsequent civil case. The Court reasoned that continued use of the grand jury material by the same attorney did not constitute a "disclosure" to the attorney. *Id.* at 109.

The Court of Appeals ruled herein that it was proper for Kirschen to serve as the I.R.S.' representative at the civil trial or as its person who is "essential" to the presentation of the I.R.S.' civil case under Tax Court Rule 145(a) and Federal Rule of Evidence 615. Since there was no evidence that Kirschen actually disclosed

any 6(e) material to counsel for the Commissioner, there was nothing improper, according to the court, about Kirschen serving as the I.R.S.' representative or essential person at the trial.

This requirement that there be proof of a disclosure does not follow from *Doe I* and may be contrary to *Sells*. In *Doe I*, there could not have been a "disclosure" to the government attorney for civil purposes because the disclosure previously was made to the government attorney properly in accordance with Rule 6(e)(3)(A)(i). However, in the case of Rule 6(e)(3)(A)(ii) government personnel, other than attorneys, who later assist government attorneys who are not eligible for disclosure under (A)(i), it is inconsistent with a finding that such personnel are "essential" or "representatives" for civil cases unless they disclose their knowledge to the attorney, who is ineligible to receive automatic disclosure. The (A)(ii) agent could not be essential unless he discloses grand jury information. Indeed, he possesses no other information. An impermissible disclosure could be subconscious as well as conscious.

The Court of Appeals apparently applied a standard which would require the petitioner to prove that a disclosure was actually made. This standard is plainly inconsistent with the teaching of *Sells* that a prophylactic rule against automatic disclosure is necesary to prevent potential grand jury abuse. 463 U.S. at 432.

It is believed that this is the first time the government ever has used (A)(ii) personnel not only to assist in civil proceedings, but also to serve as the I.R.S.' representative or essential person in such proceedings. If this practice is permitted, it will create a wide opening for potential grand jury abuse. If no disclosure of grand jury material can be made by the (A)(ii) agent to the civil attorney, then another agent might just as well be used as the government's essential person or as its representative in order to deter potential abuse.

CONCLUSION

Accordingly, the Writ should issue to review the decision of the Second Circuit as that decision conflicts with the decisions of this Court.

Respectfully submitted,

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July, 1992

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of April on thousand nine hundred and ninety-two.

Present:

Hon. WILFRED FEINBERG
Hon. WILLIAM H. TIMBERS
Hon. ROGER J. MINER
CIRCUIT JUDGES,

STAMP

JOSEPH R. DILEO, MARY A. DILEO, WALTER E. MYCEK, JR., MICHELE A. MYCEK, and ARCELO REPRODUCTION COMPANY, INC.,

Petitioners-Appellants

v.

COMMISSIONER OF INTERNATIONAL REVENUE,

Respondent-Appellee.

Docket No. 91-4178

A petition for rehearing having been filed herein by petitioners-appellants, Joseph R. Dileo, Mary A. Dileo, Walter E. Mycek, Jr., Michele A. Mycek, and Arcelo Reproduction Company, Inc.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 849 August Term 1991

Argued: February 12, 1992 Decided: March 20, 1992

Docket No. 91-4178

JOSEPH R. DILEO; MARY A. DILEO; WALTER E. MYCEK, JR.; MICHELE A. MYCEK AND ARCELO REPRODUCTION COMPANY, INC.,

Petitioners-Appellants,

- against -

COMMISSIONER OF INTERNAL REVENUE,

Restondent-Appellee.

Before: FEINBERG, TIMBERS and MINER, Circuit Judges.

Apellants appeal from the Tax Court's judgments upholding deficiency determinations assessed against appellants. They claim that certain bank records were admitted in violation of Federal Rule of Criminal Procedure 6 (e) and that the judgments should therefore be vacated.

Affirmed.

JARED J. SCHARF, White Plains, NY (Hall, Dickler, Lawler, Kent & Friedman, Morton A. Smith, of Counsel), for Petitioners-Appellants.

JOY L. PRITTS, Attorney, Tax Division, Department of Justice, Washington, DC (Shirley D. Peterson, Assistant Attorney General, Washington, DC, Gary R. Allen, Charles E. Brookhart, Attorneys, Tax Division, Department of Justice, Washington, DC, of Counsel), for Respondent Appellee.

FIENBERG, Circuit Judge:

Joseph R. DiLeo, Mary A. DiLeo, Walter E. Mycek, Jr., Michele A. Mycek and Arcelo Reproduction Company, Inc. (the taxpayers) appeal from judgments of the United States Tax Court, Arthur L. Nims, C.J., dated September 5, 1991, determining that they were liable for deficiencies in their federal income taxes. This appeal also raises issues preserved for appeal following a proceeding in the United States District Court for the Southern District of New York, Vincent L. Broderick, J., involving the same parties. The principal issue before us is whether certain documents, which had previously been the subject of a grand jury subpoena, were properly admitted into evidence against the taxpayers in the Tax Court. The taxpayers claim that the evidence should have been suppressed under Rule 6 (e) of the Federal Rules of Criminal Procedure and that absent that evidence, most of their alleged tax deficiencies would have been barred by the statute of limitations. For the reasons given below, we affirm.

I. Background

In March 1986, the Commissioner of Internal Revenue issued statutory notices of deficiency to the DiLeos and the Myceks for the tax years 1978 through 1981 and 1978 through 1982, respectively. In March 1987, the Commissioner issued a statutory notice of deficiency for the tax year 1978 through 1982 to Arcelo, a company in which Joseph DiLeo and Walter Mycek, Jr., were sole shareholders and coporate officers. In June 1986, the DiLeos and the Myceks filed petitions in the Tax Court for redeterminations of these deficiencies and in June 1987, Arcelo also sought such redetermination. The Tax Court subsequently consolidated the three cases for trial commencing in January 1988.

In early December 1987, the Commissioner served trial subpoenas duces tecum upon three banks—Chase Manhattan, Citibank and State National Bank of Connecticut, now Connecticut Bank and Trust Co. (CBT)—seeking production of "all books, records or other documents pertaining to [Arcelo's account] during the years 1977 through 1983." These records had originally been provided to a grand jury in the Southern District during a criminal investigation of the taxpayers that resulted in the indictments of Joseph R. DiLeo and Walter E. Mycek, Jr. for various tax and tax-related criminal violations. Philip B. Kirschen was the special agent of the Criminal Investigation Division (CID) of the Internal Revenue Service (IRS) assigned to assist the United States Attorney's office and the grand jury. Pursuant to plea agreements, Mycek and DiLeo pled guilty in May 1984 and March 1985, respectively, to various counts in the indictments and each received a sentence of one year and a day in prison.

After the Mycek and DiLeo criminal cases were closed in 1985, the records obtained from the banks were not returned to them. Instead, Agent Kirschen took all of the records that had accumulated during the grand jury's investigation to his CID office in Newburgh, New York, sealed them in boxes and labelled the boxes. The boxes were then transported to the IRS facility management area located in the basement of a federal building in Albany, New York. The boxes were kept inside a cage, the key to which was maintained by the CID in Albany. These boxes included the records subsequently sought by the December 1987 trial subpoenas. In response to these subpoenas, each bank separately authorized the Commissioner to obtain the records requested. Agent Kirschen obtained these records from the CID storage cage in which the grand jury documents were stored. All remaining records not requested were returned to the boxes, which were then resealed.

The consolidated Tax Court cases proceeded to trial early in 1988. The taxpayers moved to suppress the bank records on the principal ground that they were obtained in violation of Fed. R. Crim. P 6 (e), which deals with disclosure of "matters occurring before the grand jury," and that disclosure of the documents at trial would violate the law. In September 1989, after holding an evidentiary hearing and receiving briefs on the issue, the Tax Court denied the taxpayers' motion, holding that the bank records at issue were not "mattres occurring before the grand jury" and were therefore not

encompassed by Rule 6 (e). The Tax Court also ruled that the IRS was not estopped from making this argument after withholding under Rule 6 (e) other documents that had been requested by the taxpayers.

In November 1989, after this ruling of the Tax Court, Mycek and DiLeo commenced a proceeding in the Southern District to enjoin the Commissioner from using the bank records in the Tax Court trial. In September 1990, Judge Broderick issued an order (followed by an opinion in January 1991) authorizing the use of the documents in the Tax Court because the documents did not constitute "matters occurring before the grand jury," under *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960). However, Judge Broderick sharply criticized the manner in which the government handled the records after the Mycek and DiLeo criminal cases had ended. The judge also held that the Tax Court did not have the power to authorize disclosure of the grand jury material.

In November 1990, the taxpayers appealed from Judge Broderick's order to this court. In January 1991, the appeal was dismissed under a stipulation allowing the taxpayers to preserve their right to raise any issues they might have presented in that appeal on a subsequent appeal from a decision in the Tax Court case. Thereafter, the Tax Court issued an opinion in June 1991, upholding the deficiencies found by the Commissioner.

Agent Kirschen, the agent involved in the grand jury proceedings described above, was present at the Tax Court trial. During the trial, the Tax Court denied the taxpayers' request that Kirschen be excluded brom the courtroom. In its June 1991 opinion, the Tax Court reaffirmed that ruling. In September 1991, the judgements were entered from which these apeals were taken.

II. Discussion

Matters occurring before the grand jury

Rule 6 (e) of the Federal Rules of Criminal Procedure prohibits, with certain specified exceptions, the disclosure of "matters occurring before the grand jury." A knowing disclosure, except as otherwise provided in the rules, may be punished as a contempt of court. This rule of nondisclosure serves to effectuate several important policies. The rule protects the safety of witnesses who testify before the grand jury. It thereby also helps to ensure that witnesses will

be willing to come forward and that they will be able to testify fully and frankly, without fear of retribution. The secrecy also prevents suspects who might otherwise learn of investigations from fleeing their jurisdictions and from attempting to influence grand jurors prior to indictment. Finally nondisclosure protects the reputations of suspects who are untimately exonerated by the grand jury. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424 (1983).

The bank records at issue here were first obtained by a grand jury in the Southern District. They were turned over to the Commissioner several years later in response to the December 1987 trial subpoenas. The same records were ultimately used against the taxpayers at trial. Appellant taxpayers claim that this procedure improperly disclosed "matters occurring before the grand jury." The Commissioner disputes this view, relying heavily on our decision in *Intrestate Dress*. The taxpayers claim, however, that *Interstate Dress* no longer represents the state of the law after the Supreme Court's decision in *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989). In *John Doe Agency*, the Supreme Court held that certain records were exempt from production under the Freedom of Information Act (FOIA), thereby reversing a decision of this circuit holding that the records were not exempt under that Act. In our decision, we had also rejected a claim that the information involved could not be disclosed under Rule 6 (e), apparently applying the *Interstate Dress* standard (which had been argued to us), although we did not cite that case by name. *See John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 109 (2d Cir. 1988). The taxpayers argue that by reversing this circuit, the Supreme Court implicitly overruled the standard of *Interstate Dress*.

The taxpayers' argument is flawed. Although we did say in *John Doe Corp.* that Rule 6 (e) permitted disclosure, 850 F.2d at 109, the Supreme Court did not address that issue but ruled only that the requested documents were exempt from disclosure under § 7 of the FOIA, 5 U.S.C. § 522 (b) (7). The holding revolved around an analysis of the statutory language of the FOIA. See 493 U.S. at 153. Having found that the documents could not be disclosed, the Court did not reach the Rule 6 (e) issue and made absolutely no reference to Rule 6 (e) in its entire opinion. *Interstate Dress* therefore remains the law in this circuit regarding the proper interpretation of Rule 6 (e).

Under *Interstate Dress*, "When testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury." 280 F.2d at 54. Presumably, this rule rested upon the implicit assumption that in such instances disclosure would not "seriously compromise the secrecy of the grand jury's deliberations." *In re Special March 1981 Grand Jury*, 753 F2d 575, 578 (7th Cir. 1985). We have since cited *Interstate Dress* with approval, albeit in somewhat different contexts, *see S.R. Mercantile Corp. v. Maloney*, 909 F. 2d 79, 83 (2d Cir. 1990); *L. Hayden Co. of New York v. Siemens Medical Systems, Inc.*, 797 F. 2d 85, 88 (2d Cir. 1986), and we have no reason to think that *Interstate Dress* does not still represent the law in this circuit. Cf. *In re Grand Jury Proceedings*, 851 F.2d 860, 863-65 (6th Cir. 1988) (discussing decisions of various circuits on the Rule 6 (e) issue).

In this case, the taxpayers concede that the revenue agent originally assigned to the Tax Court matter by the Commissioner did not use either the Chase, Citibank or CBT records in the preparation of the report providing the basis for the statutory notices of deficiency. The IRS had an independent public source for its knowledge that the grand jury had possession of the bank records. This is clear because the account numbers, bank names and locations, and annual information concerning deposits and withdrawals were specifically set forth in the publicly-filed indictments of Mycek and DiLeo. In response to the December 1987 trial subpoenas, the three banks also indicated to the IRS that the records had been previously provided to the Southern District grand jury in response to grand jury subpoenas served years earlier. Before the IRS received the records, all references to the grand jury were removed. The IRS was therefore not learning anything about the grand jury proceedings from the bank records that it did not already know prior to obtaining them. The records admitted into evidence in the Tax Court were sought for their own sake and not to learn what took place before the grand jury and clearly did not compromise the secrecy of the grand jury's deliberations. Under *Interstate Dress*, the records were not "matters occurring before the grand jury" within the meaning of Rule 6 (e).

Disclosure order

The taxpayers contend, and Judge Broderick held, that even if the bank records were not "matters occuring before the grand jury," Rule 6 (e) still prohibited their disclosure absent a prior order from the district court. The taxpayers go on to argue that the records had been turned over to the IRS long before Judge Broderick's order and that the order could not "retroactively" cure the illegal disclosure. We do not accept this argument.

We share Judge Broderick's concern over the government's unduly informal manner in handling the bank records. It is certainly advisable for a government official to seek a judicial declaration that particular documents are not "matters occuring before the grand jury" rather than simply disclosing them and risking contempt and perhaps other sanctions because of an incorrect assumption. Nevertheless, the express terms of Rule 6 (e) require a court order only to permit disclosure of material that falls within that category. Thus, the disclosure did not violate Rule 6 (e) and no order, retroactive or otherwise, was absolutely necessary to validate it. In *Interstate Dress*, moreover, this court specifically addressed the requirements for disclosure of matters not occurring before the grand jury and noted that "[d]ocuments produced pursuant to a grand jury subpoena remain the property of the person producing them . . . . and their inspection by persons other than the grand jury and the prosecuting attorneys is therefore dependent upon the consent of the owner *or* upon a court order." 280 F.2d at 54 (citations omitted) (emphasis added). Cf. *In re Special March 1981 Grand Jury*, 753 F. 2d at 579. Here, the owners of the relevant records—Chase, Citibank and CBT—gave their consent prior to the disclosure of the documents to any revenue agent involved in the civil case.

The taxpayers argue that the consents obtained from the banks were illusory and therefore failed to satisfy the requirements of *Interstate Dress*. In this case, the government retained custody of the documents at issue under claim of right from July 1985, when the grand jury investigation concluded, until December 1987, when the subpoenas were served. Since the IRS attorneys knew this fact when they solicited the consent of the banks, the taxpayers contend that the consents were irrelevant to disclosure. We reject this argument.

It is undisputed that the banks were asked for their consent to disclosure of the records. It is also undisputed that prior to this request for consent, there had ben no disclosure to IRS agents, even though the relevant documents had been in the government's possession "under claim of right" for several years. After consent was obtained, the documents were disclosed. The banks have not voiced any objections to this disclosure nor have the taxpayers made a plausible argument that the banks had any interest in withholding their consent to the disclosure. Because no court order was required and because the government obtained consent as required under *Interstate Dress*, the bank records were properly disclosed and the Tax Court properly admitted them into evidence.

Allegedly wrongful conduct by the IRS

The taxpayers argue that the proceedings in the Tax Court were so defective that, at the very least, the burden of proof with respect to the alleged deficiencies should have been shifted to the IRS. First, the taxpayers contend that the Commissioner possessed all the grand jury records and used those that assisted the IRS while refusing production of those that would have assisted the taxpayers. Therfore, the taxpayers assert, the Commissioner had an unfair discovery advantage and the Tax Court should have shifted the burden of proof to the Commissioner. We should accordingly vacate the deficiency judgments. As the Commissioner argues, however, the assertions upon which this argument is based are unsupported by the record.

At the conclusion of the grand jury proceedings, Agent Kirschen, with the authorization of the Assistant United States Attorney, removed the specific bank records in question. Kirschen was authorized to possess these records as a government employee "deemed necessary" to assist the prosecutor under Fed. R. Crim. P. 6(e)(3)(A)(ii). See supra note 1. In December 1987, the Commissioner's trial subpoena requested only the bank records, the existence of which was evident from public documents. Kirschen provided only those specific documents, after removing all references to the grand jury, after consents were obtained from the owners of the records. Thus, the Commissioner did *not* have open access to the grand jury records.

Moreover, with regard to the information and records sought by the taxpayers, they in fact sought neither a court order nor the

consent of the owners of the records prior to disclosure, as required by *Interstate Dress*. The taxpayers have therefore failed to demonstrate that they were denied access to grand jury materials to which they were entitled, an important qualification that distinguishes the bank records introduced by the Commissioner.

The taxpayers also claimed that Agent Kirschen should not have been present in the courtroom during the civil trial. The Commissioner requested that Kirschen be allowed to remain for the limited purpose of providing certified documents and hearing testimony to determine whether there was any reason to believe that perjury had been committed. The taxpayers assert that the presence of the special agent was improper because he had had access to grand jury material under Rule 6 (e)(3)(A)(ii). This assertion is inconsistent with the principle that a government employee who has participated in a criminal prosecution may participate in the civil phase of the dispute without obtaining a court order to do so under Rule 6 (e). *See United States v. John Doe, Inc. I*, 481 U.S. 102, 107-111 (1987; cf. *In re Disclosure of Grand Jury Material*, 821 F. 2d 1290, 1292 (7th Cir. 1987). As the Supreme Court stated in *United States v. John Doe, Inc. I*, the prohibition in Rule 6 (e) is against *disclosing* grand jury matters to another. 481 U.S. at 109. There is no evidence that Kirschen disclosed any Rule 6(e) information to counsel for the Commissioner. There was therefore nothing improper about his presence as a representative of the Commissioner at the trial.

Since we find nothing improper about Kirschen's conduct, we have no occasion to consider whether or not shifting the burden of proof would have been an appropriate remedy for the sort of impropriety alleged by the taxpayers. Because we find that the admission of the bank records into evidence was neither improper nor unfair, it is also unnecessary for us to reach the questions whether the proper remedy for a Rule 6 (e) violation is suppression rather than a contempt of court charge and whether, if the bank records were suppressed, there would have been sufficient evidence of fraud to support the extension of the statute of limitations for the tax deficiencies.

We have considered all of the taxpayers' remaining arguments and none justify reversal of the Tax Court. We therefore affirm.

FOOTNOTE

1. The rule provides in pertinent part:

(e) Recording and Disclosure of Proceedings.* * * *

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph 3 (A) (ii) of this subdivision shall not disclose matters occuring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the governmentf for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

* * * *

APPENDIX C

UNITED STATES TAX COURT

JOSEPH R. DiLEO & MARY A. DiLEO	)	
	)	
Petitioners,	)	
	)	Docket No. 22366-86
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

DECISION

Pursuant to the opinion of the Court filed June 24, 1991, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax for the taxable year 1981 in the amount of $11,157.51, which amount was paid after the mailing of the notice of deficiency and an overpayment for the taxable year 1981 in the amount of $745.61;

That there are deficiencies in income tax due from the petitioners for the taxable years 1978, 1979, 1980, and 1982 in the amounts of $5,068.00, $10,635.37, $10,303.75 and $12,209.45, respectively;

That there are additions to tax due from petitioner Joseph R. DiLeo for the taxable years 1978, 1979, 1980, and 1981 under the provisions of I.R.C. § 6653(b) in the amounts of $2,534.00, $5,317.69, $5,151.87 and $5,578.75, respectively;

That there is an addition to tax due from petitioner Joseph R. DiLeo for the taxable year 1982 under the provisions of I.R.C. § 6653 (b) (1) in the amount of $6,104.72; and

That there is an addition to tax due from petitioner Joseph R. DiLeo for the taxable year 1982 under the provisions of I.R.C. § 6653 (b) (2). For purposes of computing the 50 percent interest penalty pursuant to I.R.C. § 6653 (b) (2), the penalty shall be computed on $12,209.45.

(signed) Arthur L. Nims, III

Judge

Entered: SEP 5 1991

* * * * * * * * * * *

UNITED STATES TAX COURT

WALTER E. MYCEK, JR. & MICHELLE A. MYCEK,	)	
Petitioners,	)	
	)	Docket No. 22367-86
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

DECISION

Pursuant to the opinion of the Court filed June 24, 1991, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax for the taxable year 1980 in the amount of $10,140.00, which amount was paid after the mailing of the notice of deficiency and an overpayment for the taxable year 1980 in the amount of $1,265.99;

That there is a deficiency in income tax for the taxable year 1981 in the amount of $3,852.00, which amount was paid after the mailing of the notice of deficiency and an overpayment for the taxable year 1981 in the amount of $2,922.07;

That there are dificiencies in income tax due from the petitioners for the taxable years 1978 and 1979 in the amounts of $4,681.00 and $12,867.89, respectively; and

That there are additions to tax due from petitioner Walter .E Mycek, Jr. for the taxable years 1978, 1979, 1980 and 1981 under

the provisions of I.R.C. § 6653 (b) in the amounts of $2,340.50, $6,433.94, $5,070.00 and $1,926.00, respectively.

(signed) Arthur L. Nims, III

Judge

Entered: SEP 5 1991

* * * * * * * * * * *

UNITED STATES TAX COURT

ARCELO REPRODUCTION COMPANY, INC.,	)	
Petitioner,	)	Docket No. 15778-87
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

DECISION

Pursuant to the opinion of the Court filed June 24, 1991, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there are deficiencies in income tax due from the petitioner for the taxable years 1978, 1979, 1980, 1981 and 1982 in the amounts of $25,724.76, $21,959.47, $25,698.78, $21,663.52 and $24,384.82, respectively;

That there are additions to tax due from the petitioner for the taxable years 1978, 1979, 1980, and 1981 under the provisions of I.R.C. § 6653 (b) in the amounts of $12,862.38, $10,979.74, $12,849.39 and $10,831.76, respectively;

That there is an addition to tax due from the petitioner for the taxable year 1982 under the provisions of I.R.C. § 6653 (b) (1) in the amount of $12,192.41;

That ther is an addition to tax due from the petitioner for the taxable tear 1982 under the provisions for I.R.C. § 6653 (b) (2). For

purposes of computing the 50% interest penalty pursuant to I.R.C. § 6653(b)(2), the penalty shall be computed on $24,384.82; and

That there is an addition to tax due from the petitioner for the taxable year 1982 under the provisions of I.R.C. § 6661 in the amount of $6,096.21.

(signed) Arthur L. Nims, III

Judge

Entered: SEP 5 1991

* * * * * * * * * * *

APPENDIX D

96 T.C. No. 42

UNITED STATES TAX COURT

JOSEPH R. DiLEO AND MARY A. DiLEO, ET AL.,[1] Petitioners
v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 22366-86,
22367-86,
15778-87.

Filed June 24, 1991

P1 and P2 each owned 50 percent of P3, a C corporation, and served as its president and secretary/treasurer, respectively. P3 was engaged in the business of printing and lithography. P1 and P2 ran P3's day-to-day operations and maintained its books and records. P1 and P2 opened secret bank accounts and deposited a portion of P3's gross receipts into the accounts. P1 and P2 withdrew funds from the secret bank accounts. P1 and P2 did not maintain any books or records reflecting transactions made with respect to the secret bank accounts. P3 did not report any of the gross receipts deposited into the secret bank accounts on its corporate income tax returns for the years in issue. P1 and P2 did not report any of the funds withdrawn from the secret bank accounts on their individual income tax teturns for the years in issue.

Held, P1, P2 and P3 understated the taxable income required to be shown on their income tax returns for the years in issue. *Held further*, P1, P2 and P3 are liable for additions to tax for fraud under

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1 Cases of the following petitioners have been consolidated herewith: Walter E. Mycek, Jr. and Michele A. Mycek, docket No. 22367-86; and Arcelo Reproduction Company, Inc., docket No. 15778-8.

I.R.C. sec. 6653 (b) for the years in issue. *Held further,* P3 is liable for an addition to tax under I.R.C. sec. 6661 for 1982. *Held further,* the statute of limitations does not bar assessment and collection for the deficiencies in and additions to tax due from P1, P2 and P3. *Held further,* the spouses of P1 and P2 are not entitled to relief from any tax liability under the innocent spouse provisions of I.R.C. sec. 6013 (e) for the years in issue. *Held further,* R's use of a special agent who participated in the grand jury investigation of P1 and P2 to assist him in this case did not violate Rule 6 (e), Federal Rules of Criminal Procedure, or give R and "unfair discovery advantage" because the special agent did not disclose information about matters occurring before the grand jury.

Jared J. Scharf and *Morton A. Smith,* for the petitioners.

Christopher B. Sterner, for the respondent.

NIMS, *Chief Judge:* Respondent determined the following deficiencies in and additions to petitioners' Federal income tax:

			Additions to Tax - Sections			
Petitioners	Year	Deficiency	6653(b)	6653(b)(1)	6653(b)(2)	6661
Joseph R. and	1978	$ 5,068.00	$2,534.00			
Mary A. DiLeo	1979	10,635.37	5,317.69			
	1980	10,303.75	5,151.87			
	1981	11,157.51	5,578.75			
	1982	12,209.45	--	6,104.72*		
Walter E. and Michele	1978	4,681.00	2,340.50			
A. Mycek, Jr.	1979	12,867.89	6,433.94			
	1980	11,405.99	5,703.00			
	1981	5,789.00	2,894.50			
Arcelo Reproduction	1978	25,724.76	12,862.38			
Company, Inc.	1979	21,959.47	10,979.74			
	1980	25,698.78	12,849.39			
	1981	21,663.52	10,831.76			
	1982	24,384.82	--	12,192.41**		$6,096.21

* 50 percent of interest due on $12,209.45

**50 percent of interest due on $24,384.82

(Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the years in issue. All Rule references are to the Tax Court Rules of Practice and Procedure.)

The issues for decision are whether (1) petitioners understated their income tax in the amounts determined by respondent in his notices of deficiency for the years in issue; (2) petitioners are liable for additions to tax for fraud under section 6653 (b) for the years in issue; (3) Arcelo Reproduction Company, Inc., is liable for an addition to tax under section 6661 for 1982; (4) respondent is barred from assessing the income tax due from petitioners by the statute of limitations for the years in issue; (5) Michele Mycek and Mary DiLeo are entitled to relief from any liability for tax as innocent spouses under section 6013 (e) for the years in issue; and (6) respondent's use of a person who participated in the grand jury investigation to assist him in this civil case was a violation of Rule 6 (e), Federal Rules of Criminal Procedure, or gave respondent an unfair discovery advantage.

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts and the attached exhibits are incorporated herein by this reference.

Petitioner Arcelo Reproduction Company, Inc. (Arcelo), is a corporation with its sole place of business at 7 North Lawn Avenue, Elmsford, New York. Petitioners Walter E. Mycek, Jr., and Michele A. Mycek (Myceks) are married individuals with legal residence at 34 Green Valley Road, Armonk, New York. Petitioners Joseph R. DiLeo and mary A. DiLeo (DiLeos) are married individuals with legal residence at 55 Park Circle, White Plains, New York.

Arcelo filed corporate income tax returns (Forms 1120) with respondent for the taxable years 1978, 1979, 1980, 1981, and 1982. The Myceks filed joint individual income tax returns (Forms 1040) with respondent for the taxable years 1978, 1979, 1980 and 1981. The DiLeos filed joint individual income tax returns (Forms 1040) with respondent for the taxable years 1978, 1979, 1980, 1981 and 1982.

From 1978 through 1982, Arcelo was engaged in the business of printing and lithography. From 1978 through 1982, petitioner Walter E. Mycek, Jr. (Mycek) was the president of Arcelo and owner of 50 percent of its stock. From 1978 through 1982, petitioner Joseph R. DiLeo (DiLeo) was the secretary/treasurer of Arcelo and owner of 50 percent of its stock. Mycek and DiLeo were responsible

for the day-to-day operations of Arcelo and the maintenance of its books and records concerning income it received and expenses it paid.

On or about June 21, 1977, Mycek and DiLeo opened checking accounts number 408-1-018923 in the name of Arcelo at the Chase Manhattan Bank (Chase account) which served as a depository for a portion of Arcelo's gross receipts. On or about October 12, 1979, Mycek and DiLeo opened checking account number 1620-9247 in the name of Arcelo at Citibank (Citibank account) which served as a depository for a portion of Arcelo's gross receipts. On or about August 17, 1981, Mycek and DiLeo opened checking account number 1-65509-8 in the name of Arcelo at the Connecticut Bank and Trust Company (CBT account) which served as a depository for a portion of Arcelo's gross receipts. On or about December 14, 1982, Mycek and DiLeo opened checking account number 699-876 in the name of Arcelo at Bank Mart (Mart account) which served as a depository for a portion of Arcelo's gross receipts. (Hereinafter, the Chase, Citibank, CBT and Mart accounts will be collectively referred to as the secret bank accounts.)

From 1978 through 1982, Mycek and DiLeo deposited the following amounts of Arcelo's gross receipts in the Chase, Citibank, CBT and Mart accounts:

Deposits	1978	1979	1980	1981	1982
Chase	$78,147.32	$80,865.62	$ 7,992.17	$ 7,466.23	$ -0-
Citibank	-0-	2,581.28	94,841.18	46,232.42	-0-
CBT	-0-	-0-	-0-	30,253.31	81,448.39
Mart	-0-	-0-	-0-	-0-	5,458.00
TOTAL	$78,147.32	$83,446.90	$102,833.35	$83,951.96	$86,906.39

None of the deposits which were made to the secret bank accounts were included in the gross receipts which were reported by Arcelo on its corporate Federal income tax returns.

From 1978 through 1981, Mycek received certain funds from the Chase, Citibank and CBT accounts by his receipt and negotiation of checks made payable to him on said accounts. The Myceks did not report any of the funds received from the Chase, Citibank and CBT accounts on their Federal income tax returns. The Myceks received the following amounts from the Chase, Citibank and CBT accounts:

Checks Drawn	1978	1979	1980	1981
Chase	$14,204.00	$29,777.26	$ 3,200.00	$ 900.00
Citibank	0	0	22,380.00	15,102.16
CBT	0	0	0	9,534.00
TOTAL	$14,204.00	$29,777.26	$25,580.00	$25,236.16

From 1978 through 1982, DiLeo received certain funds from the Chase, Citibank and CBT accounts by his receipt and negotiation of checks made payable to him on said accounts. The DiLeos did not report any of the funds received by DiLeo from the Chase, Citibank and CBT accounts on their Federal income tax returns. The DiLeos received the following amounts from the Chase, Citibank and CBT accounts:

Checks Drawn	1978	1979	1980	1981	1982
Chase	$14,880.69	$28,444.33	$ 2,000.00	$ 2,400.00	0
Citibank	0	0	28,824.51	16,050.00	0
CBT	0	0	0	10,675.00	30,640.00
TOTAL	$14,880.69	$28,444.33	$30,824.51	$29,125.00	$30,640.00

From 1978 through 1982, checks made payable to cash and negotiated were drawn on the Chase, Citibank and CBT accounts. The checks made payable to cash were drawn on the Chase, Citibank and CBT accounts in the following amounts:

Checks Drawn	1978	1979	1980	1981	1982
Chase	$2,868.00	$3,112.00	$ 1,250.00	$ 950.00	$ 0
Citibank	0	0	7,555.30	5,372.00	0
CBT	0	0	0	2,750.00	2,200.00
TOTAL	$2,868.00	$3,112.00	$7,805.30	$9,072.00	$2,200.00

(During 1978, 1979, 1980, and 1981, checks in the amount of $650, $950, $150, and $240, respectively, made payable to cash were drawn on the Chase and Citibank accounts and negotiated by Mycek.)

Mycek and DiLeo failed to inform the accountant who prepared Arcelo's income tax returns of the existence of the secret bank accounts. Petitioners do not currently possess or have control of any books, records or other documents reflecting transactions made with respect to the secret bank accounts during the taxable years 1978 through 1982.

On its corporate Federal income tax returns, Arcelo reported taxable income, Federal imcome tax liability, nondeductible

insurance premium and dividends received deduction for each year in issue in the following amounts:

Year	Taxable Income	Federal Income Tax	Nondeductible Insurance Premiums	Dividends Received Deduction
1978	$6,121.25	$1,224.25	$2,412.45	$463.25
1979	7,907.46	1,384.27	1,332.74	161.93
1980			1,232.45	
1981	5,959.20		1,526.47	
1982	4,807.79	801.21	2,638.89	

On or about March 28, 1984, Mycek was indicted by a grand jury on the following charges:

a. One count of conspiracy to defraud the United States by conspiring with DiLeo to impede, impair, obstruct and defeat the respondent's ability to determine the true income tax liability of Arcelo for the taxable years 1977 through 1982 in violation of 18 U.S.C. sec. 371;

b. One count of aiding and assisting in the preparation of Arcelo's false corporate income tax return for the 1978 taxable year in violation of I.R.C. sec. 7206(2);

c. Three counts of knowingly subscribing Arcelo's 1979, 1980 and 1981, respectively, corporate income tax returns which he knew were false as to material matters in violation of I.R.C. sec. 7206(1); and

d. Four counts of willfully and knowingly attempting to evade and defeat a large part of his and his wife's joint income tax liability for the taxable years 1978, 1979, 1980, and 1981, respectively, by filing false and fraudulent income tax returns on behalf of himself and his wife in violation of I.R.C. sec. 7201.

On or about May 8, 1984, Mycek pled guilty to the following charges in satisfaction of the subject indictment:

a.One count of conspiracy to defraud the United States by conspiring with DiLeo to impede, impair, obstruct and defeat the respondent's ability to determine the true income tax liability of Arcelo for the taxable years 1977 through 1982 in violation of 18 U.S.C. sec. 371;

b. One count of knowingly subscribing Arcelo's 1980 corporate income tax return which he knew was false as to material

matters in violation of I.R.C. sec. 7206(1); and

c. One count of willfully and knowingly attempting to evade and defeat a large part of his and his wife's joint income tax liability for the taxable year 1979 by filing a false and fraudulent income tax return on behalf of himself and his wife in violation of I.R.C. sec. 7201.

On or about July 9, 1984, the United States District Court for the Southern District of New York entered a judgement of conviction against Mycek incorporating the charges to which he had pled guilty and sentenced him to serve a term of imprisonment for one year and a day.

On or about January 23, 1985, DiLeo was indicted by a grand jury on the following charges:

a. One count of conspiracy to defraud the United States by conspiring with Mycek to impede, impair, obstruct and defeat the respondent's ability to determine the true income tax liability of Arcelo for the taxable years 1977 through 1982 in violation of 18 U.S.C. sec. 371;

b. Three counts of aiding and assisting in the preparation of Arcelo's false corporate income tax returns for the 1979, 1980, and 1981 taxable years, respectively, in violation of I.R.C. sec. 7206(2);

c. Two counts of knowingly subscribing Arcelo's 1978 and 1982, respectively, corporate income tax return which he knew were false as to material matters in violation of I.R.C. sec. 7206(1); and

d. Five counts of willfully and knowingly attempting to evade and defeat a large part of his and his wife's joint income tax liability for the taxable years 1978, 1979, 1980, 1981, and 1982, respectively, by filing false and fraudulent imcome tax returns on behalf of himself and his wife in violation of I.R.C. sec. 7201; and

e. One count of presenting a false sworn statement to the respondent in violation of 18 U.S.C. sec. 1001.

On or about March 14, 1985, DiLeo pled guilty to the following charges in satisfaction of the subject indictment:

a. One count of conspiracy to defraud the United States by conspiring with Mycek to impede, impair, obstruct and defeat the respondent's ability to determine the true imcome tax liability of Arcelo for the taxable years 1977 through 1982 in violation of 18 U.S.C. sec. 371;

b. One count of knowingly subscribing Arcelo's 1982 corporate income tax return which he knew was false as to material matters in violation of I.R.C. sec. 7206(1);

c. Two counts of willfully and knowingly attempting to evade and defeat a large part of his and his wife's joint income tax liability for the taxable years 1980 and 1982, respectively, by filing false and fraudulent income tax returns on behalf of himself and his wife in violation of I.R.C. sec. 7201;

d. One count of aiding and assisting in the preparation of Arcelo's false corporate income tax return for the 1980 taxable year in violation of I.R.C. sec. 7206(2); and

e. One count of presenting a false sworn affidavit to the respondent in violation of I.R.C. sec 1001.

On or about June 17, 1985, the United States District Court for the Southern District of New York entered a judgement of conviction against DiLeo incorporating the charges to which he had pled guilty and sentenced him to serve a term of imprisonment for one year and a day and pay a fine in the amout of 7,500.

The following findings, while they involve mixed questions of fact and law, are derived from the stipulations of the parties.

The statute of limitations does not bar assessment and collection of the deficiency in income tax due from Arcelo for the taxable year 1982. The statute of limitations does not bar assessment and collection of the deficiencies in income tax due from Mycek and DiLeo for the taxable years 1979, 1980 and 1981 if the six year period for assessment applies under section 6501 (e) (1) (A).

The Myceks reported gross income in the amounts of $42,911, $38,047 and $44,204 on their income tax returns for the taxable years 1979, 1980, and 1981, respectively. For purposes of computing the gross income of the Myceks within the meaning of section

6501 (e) (1), said gross income does not reflect net capital gain and does not reflect the capital gain deduction per line 14 of the 1979 return, but said gross income does reflect all capital gains, i.e., $8,067, reported on Schedule D of the 1979 return. The Myceks are entitled to claim interest expense deductions for the taxable years 1980 and 1981 in amounts of $2,584 and $5,266, respectively, in addition to those interest expense deductions claimed on the income tax returns filed with respondent for the taxable years 1980 and 1981. Moreover, for purposes of computing reported gross income of the Myceks under section 6501 (e) (1), gross income does not reflect net partnership income, but rather said gross income does reflect distributive shares of partnership gross income in the amounts of $2,100, $4,800 and $4,925 for the taxable years 1979, 1980 and 1981, respectively.

The DiLeos reported gross income in the amount of $37,808, $38,454 and $41,418 on their income tax returns for the taxable years 1979, 1980 and 1981, respectively. For purposes of computing gross income of the DiLeos under section 6501 (e) (1), said gross income reflects a liquidating dividend in the amount of $3,062 for the taxable year 1979, total wages in the amount of $26,950 for the taxable year 1980 and distributive shares of partnership gross income in the amounts of $2,100, $4,800 and $4,925 for the taxable years 1979, 1980 and 1981, respectively.

In his notices of deficiency, respondent determined that the Myceks and DiLeos understated their dividend income and Arcelo understated its gross receipts as follows:

Petitioners	Year	Gross Receipts	Dividend Income
Joseph R. and	1978		$14,745
Mary A. DiLeo	1979		28,169
	1980		30,825
	1981		29,125
	1982		30,740
Walter E. and Michele	1978		14,654
A. Mycek, Jr.	1979		30,627
	1980		29,980
	1981		18,542
Arcelo Reproduction	1978	$ 78,147.52	
Company, Inc.	1979	83,476.90	
	1980	102,833.35	
	1981	81,294.61	
	1982	91,242.68	

Respondent further determined that (1) Arcelo, Mycek and DiLeo were liable for additions to tax for fraud under section 6653 (b) for the years in issue; and (2) Arcelo was liable for the addition to tax under section 6661 for 1982.

OPINION

Arcelo's Deficiencies

Respondent asserts that Arcelo understated the taxable income required to be shown on its income tax returns for 1978, 1979, 1980, 1981 and 1982 in the amounts of $78,147.52, $83,476.90, $102,833.35, $81,294.61 and $91,242.68, respectively. Petitioners contend that Arcelo did not understate its income in the amounts indicated.

Section 61 (a) defines gross income as "all income from whatever source derived," including gross income derived from business. Every person liable for any tax must maintain books and records sufficient to establish the amount of his or her gross income. Section 6001; *Estate of Mason v. Commissioner*, 64 T.C. 651, 656 (1975), affd. 566 F. 2d 2 (6th Cir. 1977).

Respondent asserts that he "was forced to determine the gross income which Arcelo derived from its business activity" under the bank deposits method because Arcelo failed to maintain adequate books and records and "submit such records to respondent in connection with his examination of Arcelo's income tax returns."

The use of the bank deposit method for computing income has long beed sanctioned by the courts. *Estate or Mason v. Commissioner, supra* at 656. When a taxpayer keeps no books or records and has large bank deposits, the Commissioner is not arbitrary or capricious in resorting to the bank deposits method for computing income. *Hague Estate v. Commissioner*, 132 F.2d 775 (2d Cir. 1943), affg. 45 B.T.A. 104 (1941); *Estate of Mason v. Commissioner, supra* at 657.

From 1978 through 1982, Arcelo was engaged in the business of printing and lithography. During that time, Mycek and DiLeo each owned 50 percent of Arcelo's stock and served as its president and secretary/treasurer, respectively. From 1978 through 1982, Mycek and DiLeo deposited a portion of Arcelo's gross receipts into the secret bank accounts (*supra* at 5) and did not report the receipts on the income tax return filed by Arcelo for each of those years. Petitioners did not maintain any books or records reflecting

the transactions made with respect to the secret bank accounts. Under these circumstances, respondent may determine Arcelo's gross income by using the bank deposits method.

Bank deposits are prima facie evidence of income. *Tokarski v. Commissioner*, 87 T.C. 74, 77 (1986); *Estate of Mason v. Commissioner*, *supra* at 656; see also *Hague Estate v. Commissioner*, *supra at 777-778*. The bank deposits method assumes that all money deposited in a taxpayer's bank account during a given period constitutes taxable income. *Price v. United States*, 335 F. 2d 671, 677 (5th Cir. 1964). Of course, when the bank deposits method is employed, "the Government must take into account any non-taxable source or deductible expense of which it has knowledge." *Price v. United States*, *supra* at 677.

Respondent submitted into evidence copies of bank records disclosing all deposits to and disbursements from the secret bank accounts during the years in issue. Respondent analyzed the bank records and prepared schedules which summarized all of the transactions, deposits and disbursements occurring in the accounts during the years in issue. Respondent identified any deposits which represented nontaxable income or were previously reported business receipts of Arcelo. Consequently, respondent has properly reconstructed Arcelo's gross income under the bank deposits method.

The amount of Arcelo's gross receipts deposited into the secret bank accounts varies slightly form the reported gross income set forth in the notices of deficiency issued to Arcelo. Specifically, the amount deposited into the secret bank accounts differs from the amount on the notices of deficiency by 3.2 percent and 4.7 percent for 1981 and 1982, respectively. The fact that the Commissioner was not completely correct does not invalidate the method employed. *Marcello v. Commissioner*, 380 F. 2d. 494 (5th Cir. 1967), affg. in part and revg. in part T.C. Memo. 1964-302; *Halle v. Commissioner*, 175 F. 2d 500, 503 (2d Cir. 1949), affg. 7 T.C. 245 (1946).

Petitioners, however, contend that respondent's bank deposits analysis "fails to comply with applicable legal requirements." Specifically, petitioners claim that a proper bank deposit proof requires the government (1) to investigate for and eliminate transfers and deposits and other nontaxable income; (2) to show through analysis that the deposits were regular and periodic and have the appearance of income; (3) to prove that the taxpayer conducted a regular

business activity and that the business activity is capable of generating gross receipts to the extent shown by the bank deposits; and (4) to prove that the government checked leads which were reasonably susceptible of being verified.

Petitioners cite *United States v. Slutsky*, 487 F. 2d 832 (2d Cir. 1973), in support of their contention that respondent did not submit "proper bank deposits proof." In *Slutsky*, taxpayers appealed criminal tax evasion convictions on the ground that the evidence adduced by the government under the bank deposits method of proof was insufficient to support the convictions. In *United States v. Slutsky*, *supra* at 840-841, the Second Circuit held that when the bank deposits method is employed, the government's burden of proof included showing that the prosecution did not disregard explanations by the defendant reasonably susceptible of being checked.

Petitioners' reliance on the *Slutsky* case to show that respondent's bank deposits analysis was defective is misplaced. As the United States Court of Appeals for the Fifth Circuit has held, "Since this is a civil action by the Government to recover a deficiency, the cases involving criminal prosecutions for tax evasion are not apposite because of the greater burden of proof imposed upon the Government in that class of cases." *Price v. United States*, *supra* at 677. Respondent's determination of income tax deficiencies is presumed correct. *Halle v. Commissioner*, *supra* at 502. Thus, petitioners, not the government, bear the burden of proving that respondent's detremination of underreported income, computed using the bank deposits method of reconstructing income, is incorrect. *Parks v. Commissioner*, 94 T.C. 654, 658 (1990); *Nicholas v. Commissioner*, 70 T.C. 1057, 1064 (1978).

Petitioners, however, assert that the burden of going forward with the evidence should be shifted to respondent because respondent did not give petitioners access to grand jury records needed to disprove a part of the deficiency while respondent used grand jury records to establish the deficiency. In support of their assertion, petitioners cite, among other cases, *Llorente v. Commissioner*, 649 F. 2d 152, 156 (2d Cir. 1981), affg. in part and revg. in part 74 T.C. 260 (1980); and *Jackson v. Commissioner*, 73 T.C. 394 (1979).

In *Llorente* and *Jackson*, respondent reconstructed the taxpayer's income without any evidence in the record showing that the taxpayer had actually received anything during the period in issue. In *Llorente v. Commissioner*, *supra* at 156, the Second Circuit held

that respondent's determination was "arbitrary and without rational foundation" because the evidence in the record did not link the taxpayer to "some tax-generating acts." Similarly, in *Jackson v. Commissioner, supra* at 403, we held that respondent's determination was "arbitrary and excessive" because it was based solely "on a secondhand report or peripheral statements made by an unreliable informant" who did not even link the taxpayer with either money or drugs. In both of these so-called drug related cases, the burden of going forward was no longer on the taxpayer because respondent's determination was found to be "arbitrary and excessive." See *United States v. Janis*, 428 U.S. 433 (1976); see also *Helvering v. Taylor*, 293 U.S. 507 (1935).

Petitioners do not contend that the burden of going forward should be shifted to respondent because he did not link Arcelo to tax-generating activity. Instead, petitioners contend that the burden of going forward should be shifted to respondent because "The hallmark features present in the cases that shift to the respondent the burden of proving the deficiency is unfairness and arbitrariness" and "respondent acted unfairly and arbitrarily."

Petitioners allege the following facts in support of their contention that respondent acted unfairly and arbitrarily. Petitioners claim that respondent had possession of certain grand jury records. Petitioners further claim that when they requested disclosure of certain grand jury records, which included bank records, respondent refused on the ground that such records were secret under the provisions of Rule 6 (e), Federal Rules of Criminal Procedure (Rule 6 (e)). Petitioners, however, claim that "on the eve of trial, respondent used grand jury records—which also were bank accounts—to prove its case."

Petitioners' assertion that the burden of groing forward should be shifted to respondent due to "unfairness" is a veiled attempt to relitigate an issue previously ruled on in *DiLeo v. Commissioner*, T.C. Memo. 1989-540.

In *DiLeo v. Commissioner*, T.C. Memo. 1989-540, 58 T.C.M. 304, 310, 50 P-H Memo T.C. par. 89,540 at 2706, we stated:

> Petitioners contend that the only available copies of certain records essential to their cases are contained in the sealed boxes of grand jury records. Petitioners allege that respondent is using Rule 6 (e) as a "sword and a shield" to prevent petitioners from substantiating deductible expenses. *** DiLeo and Mycek, both

50-percent stockholders of Arcelo, had adequate opportunity to file an ex parte 6 (e) motion in the United States District Court for the Southern District of New York demonstrating "particularizd need" for the grand jury records under *Baggot* and *Sells*. [Citations omitted.] Accordingly, we refrain from applying judicial estoppel in the instant case·

As discussed above, petitioners had adequate opportunity to file a Rule 6 (e) motion in the district court to obtain any grand jury materials needed to prove their cases. It follows that respondent's conduct did not preclude petitioners from obtaining whatever grand jury materials which were needed to prepare their cases for trial. Consequently, we refuse to shift the burden of going forward to respondent based on petitioners' unfounded allegation that respondent's conduct renders these proceedings "inherently unfair and arbitrary."

Petitioners bear the burden of proving that respondent's determination of underreported income, computed using the bank deposits method of reconstructing income, is incorrect. *Parks v. Commissioner, supra* at 658; *Nicholas v. Commissioner, supra* at 1064. If the taxpayer feels that the government's method of computation is unfair or inaccurate, the burden is on him to show such unfairness or inaccuracy. *Price v. United States, supra* at 677. Petitioners do not challenge the computational accuracy of respondent's analysis of the secret bank accounts. Consequently, we hold that Arcelo understated the taxable income required to be shown on its income tax returns for the taxable years 1978, 1979, 1980, 1981 and 1982 in the amounts set forth in the notices of deficiency.

Petitioners further assert that respondent's bank deposits analysis was defective because respondent ignored leads suggesting that petitioners "had deductible expenses in the form of commercial kickbacks in their commercial printing business." See *Brizell v. Commissioner*, 93 T.C. 151 (1989). Respondent counters that petitioners have the burden of proving that Arcelo is entitled to claim any business expense deductions.

Of course, when the bank deposits method is employed, "the Government must take into account any non-taxable source of deductible expense of which it has knowledge." *Price v. United States, supra* at 677. Respondent, however, is not required to follow any "leads" suggesting that petitioners might have some deductible expenses. *Marcello v. Commissioner*, 380 F. 2d at 497. Rather,

petitioners bear the burden of proving that they are entitled to deductions for amounts paid to obtain commercial printing business for Arcelo. *Marcello v. Commissioner, supra* at 497; Rule 142 (a).

Mycek and DiLeo testified that checks made payable to cash were actually bribes paid to Robert Petty for the business of Luxo Lamp Corporation. Petitioners did not submit any documentary evidence to corroborate the self-serving testimony of Mycek and DiLeo. Consequently, we find that the testimony of Mycek and DiLeo standing alone is insufficient to prove that the checks drawn on the secret bank accounts payable to cash were bribes or kickbacks to obtain printing business for Arcelo.

Arcelo's Fraud Additons

Respondent next asserts that "all of the underpayment of tax required to be shown on each of Arcelo's income tax returns for the taxable years 1978, 1979, 1980, 1981 and 1982 is due to fraud on the part of Arcelo." Petitioners counter that "Respondent has not proved fraud by clear and convincing evidence."

Section 6653 (b) as in effect for the years in issue provided in pertinent part:

> (b) FRAUD.—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. ***

(For 1982, respondent must also establish the specific portion of the underpayment of tax which is attributable to fraud solely for purposes of applying the "50 percent of the interest payable" provisions of section 6653 (b) (2).[2]) Respondent has the burden of

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[2] Section 6653 (b) (2) provides:

> (2) ADDITIONAL AMOUNT FOR PORTION ATTRIBUTABLE TO FRAUD.—There shall be added to the tax (in addition to the amount determined under paragraph (1)) an amount equal to 50 percent of the interest payable under section 6601—
>
> (A) with respect to the portion of the underpayment described in paragraph (1) which is attributable to fraud, and
>
> (B) for the period beginning on the last day prescribed by law for payment of such underpayment (determined without regard to any extension) and ending on the date of the assessment of the tax (or, if earlier, the date of the payment of the tax).

proving by clear and convincing evidence that some part of an underpayment for each year in issue was due to fraud. Section 7454 (a); Rule 142 (b). Consequently, respondent must establish both that (1) the taxpayer has underpaid his taxes for each year; and (2) some part of the underpayment is due to fraud. *Hebrank v. Commissioner*, 81 T.C. 640, 642 (1983).

To prove an underpayment, the Commissioner is not required to establish the precise amount of the deficiency determined by him. However, he cannot discharge his burden by simply relying on the taxpayer's failure to prove error in his determination of the deficiency. *Otsuki v. Commissioner*, 53 T.C. 96, 106 (1969); *Pigman v. Commissioner*, 31 T.C. 356, 370 (1958). It is only if and when the Commissioner establishes an underpayment by clear and convincing evidence that his deficiency determination will enjoy its usual presumption of correctness. See *Compton v. Commissioner*, T.C. Memo. 1983-642; *Cleveland v. Commissioner*, T.C. Memo. 1983-299. As in the usual case, the burden of proof in respect of that determination will then rest with the taxpayer.

Respondent can satisfy his burden of proving the first prong of the fraud test, i.e., an underpayment, when the allegations of fraud are interwined with unreported and indirectly reconstructed income in one of two ways. *Parks v. Commissioner*, 94 T.C. at 661. Respondent may prove an underpayment by proving a likely source of the unreported income. *Holland v. United States*, 348 U.S. 121 (1954); *Parks v. Commissioner, supra* at 661; *Nicholas v. Commissioner*, 70 T.C. at 1066. Alternatively, where the taxpayer alleges a nontaxable source, respondent may satisfy his burden by disproving the nontaxable source so alleged. *United States v. Massei*, 355 U.S. 595 (1958); *Parks v. Commissioner, supra* at 661.

Respondent submitted into evidence bank records, deposit slips and checks showing that substantial amounts were deposited into secret bank accounts. Petitioners stipulated that the secret bank accounts served as a depository for a portion of Arcelo's gross receipts. Petitioners further stipulated that Arcelo did not include the gross receipts deposited into the secret bank accounts in the gross receipts which it reported on its corporate Federal income tax returns for 1978, 1979, 1980, 1981, and 1982. Therefore,

respondent has shown by clear and convincing evidence that Arcelo had underpaid a portion of its corporate taxes during each of the years in issue.

Respondent next contends that the record "clearly establishes that Arcelo had the specific purpose and intent to evade taxes which it believed to be owing for the taxable years 1978, 1979, 1980, and 1981 and 1982 and that the underpayments of tax were due in each of said years to its intent to evade." Petitioners counter that "No concrete facts have been presented to show that Arcelo had an intent to cheat the government."

Fraud is defined as in intentional wrongdoing designed to evade tax believed to be owing. *Professional Services v. Commissioner*, 79 T.C. 888, 930 (1982). Respondent's burden of proving fraud is met if it is shown that the taxpayer intended to evade taxes known to be owing by conduct intended to conceal, mislead or otherwise prevent the collection of taxes. *Stoltzfus v. United States*, 398 F. 2d 1002, 1004 (3d Cir. 1968); *Rowlee v. Commissioner*, 80 T.C. 1111, 1123 (1983).

The existence of fraud is a question of fact to be resolved from the entire record. *Gajewski v. Commissioner*, 67 T.C. 181, 199 (1976), affd. without published opinion 578 F. 2d 1383 (8th Cir. 1978). The taxpayer's entire course of conduct can be indicative of fraud. *Stone v. Commissioner*, 56 T.C. 213, 214 (1971). Because fraud can rarely be established by direct proof of the taxpayer's intention, fraud may be proved by circumstantial evidence. *Rowlee v. Commissioner, supra* at 1123. In *Bradford v. Commissioner*, 796 F. 2d 303, 307 (9th Cir. 1986), affg. T.C. Memo. 1984-601, the Ninth Circuit gave a nonexclusive list of circumstantial evidence which may give rise to a finding of fraudulent intent. These badges of fraud include (1) understatement of income; (2) inadequate records; (3) concealment of assets; and (4) engaging in illegal activities.

A corporation can act only through its officers and does not escape responsibility for acts of its officers performed in that capacity. *Federbush v. Commissioner, 34 T.C. 740, 749 (1960), affd. 325 F. 2d 1 (2d Cir. 1963).* It follows that corporate fraud necessarily depends upon the fraudulent intent of the corporate officers.

Auerbach Shoe Co. v. Commissioner, 216 F. 2d 693 (1sh Cir. 1954), affg. 21 T.C. 191 (1953); *Currier v. United States*, 166 F. 2d 346 (1st Cir. 1948); *Federbush v. commissioner, supra* at 749.

In *Federbush v. Commissioner, supra* at 749, the president of a corporation supplied false information to the accountant who prepared the corporation's income tax returns. These returns were signed by the president and "the signing of income tax returns was within the scope of his duties and authority." *Federbush v. Commissioner, supra* at 749. Under these circumstances, the evidence that the returns were filed by the corporation with fraudulent intent to evade tax was clear and convincing. *Federbush v. Commissioner, supra* at 749.

Arcelo's president, Mycek, and secretary/treasurer, DiLeo, opened secret bank accounts which served as a depository for a portion of Arcelo's gross receipts. Petitioners failed to maintain any books, records or other documents reflecting transactions made with respect to the secret bank accounts. Mycek and DiLeo failed to inform the accountant who prepared Arcelo's income tax returns of the existence of the secret bank accounts. Mycek and DiLeo signed Arcelo's corporate Federal income tax returns in their capacity as officers of Arcelo knowing that a portion of Arcelo's gross receipts was not included in the gross receipts reported on the returns. Consequently, Mycek and DiLeo systematically failed to report a substantial portion of Arcelo's gross receipts on its corporate Federal income tax returns for each of the years in issue.

Mycek and DiLeo were convicted of conspiring to impede, impair, obstruct and defeat respondent's ability to determine Arcelo's correct income tax liability for the-years in issue. Mycek and DiLeo were also convicted under section 7206 (1) of willfully making and subscribing to Arcelo's corporate income tax returns for 1980 and 1982, respectively, which they did not believe to be true and correct as to every material matter. As officers of Arcelo, Mycek's and DiLeo's fraudulent intent is imputed to the corporation. *Auerbach Shoe Co. v. Commissioner, supra*. Under these circumstances, we hold that respondent has established by clear and convincing evidence that the entire underpayment of tax required to be shown on Arcelo's income tax returns for each of the years in issue was due to fraud.

Respondent next asserts that "Arcelo is liable for an addition to tax under I.R.C. sec. 6661 (a) for the taxable year 1982." Petitioners counter that "Arcelo is not liable for a substantial understatement penalty for 1982."

Section 6661 (a) provides that "If there is a substantial understatement of income tax for any taxable year, there shall be added to the tax an amount equal to 25 percent of the amount of any underpayment attributable to such understatements." In general, "the term 'Understatement' means the excess of—(i) the amount of the tax required to be shown on the return for the taxable year, over (ii) the amount of the tax imposed which is shown on the return." Section 6661 (b) (2).

On its 1982 corporate Federal income tax return, Arcelo reported an income tax liability in the amount of $301.21. Respondent determined a deficiency in Arcelo's corporate Federal income tax for 1982 in the amount of $24,384.82. Arcelo has failed to prove that respondent's deficiency determination was erroneous. It follows that the amount required to be shown on Arcelo's income tax return is $24,686.03 (the amount reported, $301.21, plus the amount of the deficiency, $24,384.82). Consequently, Arcelo's understatement of income tax is $24,384.82 (the excess of the amount required to be shown on the return, $24,686.03 over the amount shown on the return, $301.21).

A substantial understatement occurs if the amount of the understatement of income tax for the taxable year exceeds the greater of 10 percent of the tax required to be shown on the return or $10,000. Section 6661 (b) (1) (A) and (B). Arcelo substantially understated its income tax liability for 1982 because the amount of the understatement exceeded both 10 percent of the tax required to be shown on the return and $10,000. Therefore, Arcelo is liable for the addition to tax imposed by section 6661 (a) for 1982.

Section 6661 (a) was originally added to the Code by section 323 (a) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 324, 613. As originally enacted, section 6661 provided that there shall be added to the tax an amount equal to 10 percent of the amount of any underpayment attributable to the substantial understatement of income tax liability, applicable to returns due after December 31, 1982 (section 323 of the Act, 96 Stat. at 615).

In 1986, Congress passed two acts, each of which amended

section 6661 (a). See *Pallottini v. Commissioner*, 90 T.C. 498, 501 (1988). The Tax Reform Act of 1986 (TRA 86), Pub. L. 99-514, section 1504, 100 Stat. 2085, 2743, generally provided that section 6661 (a) is amended by striking out "10 percent" and inserting in lieu thereof "20 percent" effective for returns the due date for which is after December 31, 1986. See *Pallottini v. Commissioner, supra* at 501. The Omnibus Budget Reconsiliation Act of 1986 (OBRA 86), Pub. L. 99-509, section 8002, 100 Stat. 1874, 1951, provided that the addition for substantial understatement will be 25 percent of the underpayment attributable thereto for all additions assessed after the date of the enactment of this Act. TRA 86 was passed by the House of Representatives and the Senate on September 25, 1986, and September 27, 1986, respectively. See *Pallottini v. Commissioner, supra* at 501. OBRA 86 was passed by both the House of Representatives and the Senate on October 17, 1986. See *Pallottini v. Commissioner, supra* at 501. OBRA 86 was signed into law on October 21, 1986, and TRA 86 was signed into law on October 22, 1986. *Pallottini v. Commissioner, supra* at 502.

In *Pallottini v. Commissioner, supra* at 503, we held that "OBRA 86 controls over TRA 86" and, thus, "The rate of the addition to tax under section 6661 (a) is 25 percent, not 10 percent or 20 percent." Therefore, the substantial understatement addition is 25 percent of Arcelo's underpayment attributable to the substantial understatement.

Petitioners, however, contend that the provisions in OBRA 86 increasing the rate imposed on an underpayment under section 6661 (a) "violate the Ex Post Facto clause of the Constitution." Respondent replies that "it is well established that the constitutional prohibition against ex post facto laws may not be applied to additions to tax, as petitioners argue. See *Bankers Trust Co. v. Blodgett*, 260 U.S. 647 (1923)." We agree with respondent.

The prohibition against ex post facto laws applies only to penal legislation that imposes or increases criminal punishment for conduct predating its enactment. See *Harisiades v. Shaughnessy*, 342 U.S. 580 594 (1952). The ex post facto clause is not applicable to legislation imposing civil liabilities. See *Johannessen v. United States*, 225 U.S. 227, 242 (1912). Applying these principles, the Supreme Court rejected an ex post facto challenge to Connecticut's retrospective application of an addition to tax in *Bankers Trust Co. v. Blodgett, supra*.

In *Karpa v. Commissioner*, 909 F. 2d 784 (4th Cir. 1990), affg. T.C. Memo. 1989-535, a taxpayer challenged the imposition of the addition to tax under section 6661 (a) at the 25 percent rate on the ground that the increased rate was an ex post facto law. The Fourth Circuit held that the increased addition imposed under former section 6661, as amended by OBRA 86, is a civil sanction. *Karpa v. Commissioner, supra* at 788. Thus, "Under *Bankers' Trust*, 260 U.S. at 652, *** retroactive application of a civil tax penalty," such as the increased additions to tax under section 6661 (a), "does not offend the ex post facto clause." *Karpa v. Commissioner, supra* at 788. Accordingly, we reject petitioners' argument that the application of the 25 percent rate under section 6661 (a) to the underpayment in tax for 1982 violates the ex post facto clause.

Petitioners further contend in their brief that no section 6661 addition is applicable to Arcelo because "the new law [Omnibus Budget Reconciliation Act of 1989] repealed the 25% penalty provided by the 1986 law *and* did not leave any penalty to replace it for a return filed before January, 1990."

Section 7721, Omnibus Budget Reconsiliation Act of 1989 (OBRA 89), Pub. L. 101-239, 103 Stat. 2395, repealed section 6661 and recodified the substantial understatement addition as section 6662 (b) (2). Specifically, section 7721 (c) (2) of OBRA 89 repealed Code section 6661. Section 7721 (d) of OBRA 89 made the repeal applicable to returns the due date for which (determined without regard to extensions) is after December 31, 1989. By its terms, OBRA 89 only repealed section 6661 for returns due after December 31, 1989. Thus, OBRA 89 did not repeal section 6661 for returns due prior to January 1, 1990. Section 7721 (d), OBRA 89, Pub. L. 101-239, 103 Stat. 2400.

Petitioners, nonetheless, argue that no section 6661 addition applies "to assessments of 1982 taxes where such assessments are made in 1990 or after" because "the 1986 amendment no longer applies either, as the entire Section 6661 was repealed in 1989." Petitioners note that "This argument was raised and rejected in *Vessio v. Commissioner*, T.C. Memo 1990-565 (Oct. 29, 1990)."

In *Vessio v. Commissioner, supra*, the taxpayer argued that "If OBRA 1986 repealed TEFRA 1982's version of section 6661, then, by the same reasoning, the Budget Reconciliation Act of 1989 had to have repealed OBRA 1986 for pre-OBRA 1986 tax returns, such as these." In *Vessio v. Commissioner, supra*, we stated:

OBRA '86 repealed the provisions of TEFRA with respect to returns due prior to OBRA '86's enactment because Congress provided that the 25 percent rate imposed by OBRA '86 would apply to assessments made after October 21, 1986, even where such assessments relate to returns due prior to such date, provided such returns were due after December 31, 1982. See *Karpa v. Commissioner*, 909 F. 2d 784 (4th Cir. 1990), affg. a Memorandum Opinion of this Court. Congress, however, did not make such a provision when it enacted OBRA '89, and there is no basis for the analogy which petitioner attempts to draw. [60 T.C.M. 1150, 1151, 59 P-H Memo T.C. par. 90, 565 at 2783.]

In sum, OBRA 89's repeal of section 6661 for returns due after December 31, 1989, did not repeal section 6661 for returns due before January 1, 1990.

Petitioners, alternatively, contend that "the 10% penalty provided by old Section 6661, as in effect before the 1986 amendment, should govern on the theory that if the 1989 amendment repealed the 1986 amendment, which repealed the 1982 TEFRA provision, then the 1982 provision, i.e. the 10% penalty, has been restored."

As discussed above, OBRA 89 did not repeal section 6661 for returns due prior to January 1, 1990. As a result, section 6661 as amended by OBRA 86 remains in effect for assessments made after October 21, 1986, with respect to returns due prior to January 1, 1990. Accordingly, Arcelo is liable for the substantial understatement addition under section 6661 in the amount equal to 25 percent of the underpayment attributable to the understatement for 1982.

Statute of Limitations

Petitioners assert that "The assessments against [Arcelo] are time barred because they were made after the expiration of the limitations period." Respondent counters that (1) "The deficiencies in income tax due from Arcelo for the taxable years 1978, 1979, 1980 and 1981 may be assessed and collected pursuant to I.R.C. section 6501 (c) (1);" and (2) the deficiency in income tax due from Arcelo for taxable year 1982 may be assessed and collected pursuant to a stipulation.

Section 6501 (a) generally provides that any tax must be assessed within three years after the return is filed. Section 6501 (c), however, provides in part:

(1) FALSE RETURN.—In the case of a false or fraudulent

return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

As discussed above, respondent has established by clear and convincing evidence that Arcelo underpaid its taxes during each of the years in issue and that the underpayments were due to fraud. Moveover, the parties stipulated that the statute of limitations does not bar assessment and collection of the deficiency in income tax due from Arcelo for 1982. Accordingly, the statute of limitations does not bar assessment and collection of the deficiencies in income tax due from Arcelo for the years in issue.

Myceks' and DiLeos' Deficiencies

Respondent next asserts that the Myceks and the DiLeos understated the income tax required to be shown on their income tax returns as follows:

	1978	1979	1980	1981	1982
Myceks	$14,654	$30,627	$27,396*	$13,276*	$ - -
DiLeos	14,745	28,169	30,825	29,125	30,740

* (The computation of the understatement of taxable income for the taxable years 1980 and 1981 reflects respondent's concession that the Myceks are entitled to claim additional interest expense deductions in the amounts of $2,584 and $5,266, respectively.)

Petitioners contend that the Myceks and the DiLeos did not understate their income in the amounts indicated.

Section 61 (a) defines gross income as "all income from whatever source derived," including gross income derived from dividends. Every person liable for any tax must maintain books and records sufficient to establish the amount of his or her gross income. Section 6001; *Estate of Mason v. Commissioner*, 64 T.C. 651, 656 (1975), affd. 566 F. 2d 2 (6th Cir. 1977). The use of the bank deposits method for computing income has long been sanctioned by the courts. *Estate of Mason v. Commissioner, supra* at 656. When a taxpayer keeps no books or records and has large bank deposits, the Commissioner is not arbitrary or capricious in resorting to the bank deposits method for computing income. *Hague Estate v. Commissioner*, 132 F. 2d 775 (2d Cir. 1943), affg. 45 B.T.A. 104 (1941); *Estate of Mason v. Commissioner, supra* at 657,

From 1978 through 1981, Mycek received certain funds from the secret bank accounts by his receipt and negotiation of checks

made payable to him. The Myceks did not report any of the funds received from the secret bank accounts on their Federal income tax returns for 1978, 1979, 1980 and 1981. From 1978 through 1982, DiLeo received certain funds from the secret bank accounts by his receipt and negotiation of checks made payable to him. The DiLeos did not report any of the funds received from the secret bank accounts on their Federal income tax returns for 1978, 1979, 1980, 1981 and 1982. Mycek and DiLeo did not maintain any books or records reflecting the transactions made with respect to the secret bank accounts. Under these circumstances, respondent may reconstuct the Myceks' and the DiLeos' gross income under the bank deposits method.

Though not conclusive, bank deposits are prima facie evidence of income. *Tokarski v. Commissioner*, 87 T.C. at 77; *Estate of Mason v. Commissioner, supra* at 656; see also *Hague Estate v. Commissioner, supra* at 777-778. The bank deposits method assumes that all money deposited in a taxpayer's bank account during a given period constitutes taxable income. *Price v. United States*, 335 F. 2d 671, 677 (5th Cir. 1964).

Respondent submitted into evidence copies of bank records disclosing all deposits to and disbursements from the secret bank accounts during the years in issue. Respondent analyzed the bank records and prepared schedules which summarized all of the transactions, deposits and disbursements occurring in the accounts during the years in issue. Consequently, respondent has properly calculated the amounts Mycek and DiLeo received from Arcelo based on the bank deposits method.

Petitioners argue that the bank deposits method used by respondent was "defective" because, among other reasons, he did not prove that he checked all leads susceptible of being verified. Respondent counters that petitioners bear the burden of proving that the bank deposit did not result in the receipt of taxable income. We agree with respondent.

Petitioners again cite *United States v. Slutsky*, 487 F. 2d 832 (2d Cir. 1973), in support of their contention that respondent did not submit "proper bank deposits proof." As discussed above, since this is a civil action by the government to discover a deficiency,

the cases involving criminal prosecutions for tax evasion are not apposite because of the greater burden of proof imposed upon the government in that class of cases. *Price v. United States*, *supra* at 677.

Respondent's determination of income tax deficiencies is presumed correct. *Halle v. Commissioner*, 175 F. 2d at 502. Petitioners bear the burden of proving that respondent's determination of underreported income, computed using the bank deposits method of reconstructing income, is incorrect. *Parks v. Commissioner*, 94 T.C. at 658; *Nicholas v. Commissioner*, 70 T.C. at 1064. If the taxpayer feels that the government's method of computation is unfair or inaccurate, the burden is on him to show such unfairness or inaccuracy. *Price v. United States*, *supra* at 677. Petitioners do not challenge the computational accuracy of respondent's analysis of the secret bank accounts. Consequently, we hold that Mycek and DiLeo received the amounts set forth in the notices of deficiency.

It is well established that when controlling shareholders divert corporate income to themselves, it is proper to treat such diverted funds as constructive dividends for tax purposes. *Simon v. Commissioner*, 248 F. 2d 869, 873 (8th Cir. 1957); *Chesbro v. Commissioner*, 21 T.C. 123 (1953), aff'd. 225 F.2d 674 (2d Cir. 1955).

From 1978 through 1982, Mycek and DiLeo each owned 50 percent of Arcelo's stock and served as its president and secretary/treasurer, respectively. Mycek and DiLeo diverted a portion of Arcelo's gross receipts which were deposited into the secret bank accounts to themselves and did not report the amounts diverted on their income tax returns. Therefore, Mycek and DiLeo received constructive dividends because they were controlling shareholders who diverted corporate income to themselves.

Petitioners, however, argue that Mycek and DiLeo did not understate their income because respondent "failed to offer into evidence an analysis of earnings and profits to determine if amounts received by Mycek and DiLeo are dividends or capital gain or nontaxable return of capital." Respondent contends that Mycek and DiLeo "must bear the burden of proof to establish*** that the corporation had insufficient earnings and profits to support dividend treatment."

Under section 301 (c)[3] and 316 (a),[4] dividends are taxable to the shareholder as ordinary income to the extent of the earnings and profits of the corporation, and any amount received by the shareholder in excess of earnings and profits is considered as a

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[3] Section 301 (c) states as follows:

(c) AMOUNT TAXABLE.—In the case of a distribution to which subsection (a) applies—

(1) AMOUNT CONSTITUTING DIVIDEND.—That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income.

(2) AMOUNT APPLIED AGAINST BASIS.—That portion of the distribution which is not a dividend shall be applied against and reduce the adjusted basis of the stock.

(3) AMOUNT IN EXCESS OF BASIS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), that portion of the distribution which is not a dividend, to the extent that it exceeds the adjusted basis of the stock, shall be treated as gain from the sale or exchange of property.

(B) DISTRIBUTIONS OUT OF INCREASE IN VALUE ACCURED BEFORE MARCH 1, 1913.—That portion of the distribution which is not a dividend, to the extent that it exceeds the adjusted basis of the stock and to the extent that it is out of increase in value accrued before March 1, 1913, shall be exempt from tax.

[4] Section 316 (a) states in part as follows:

(a) GENERAL RULE.—For purposes of this subtitle, the term "dividend" means any distribution of property made by a corporation to its shareholders—

(1) out of its earnings and profits accumulated after February 28, 1913, or

(2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

nontaxable return of capital to the extent of the shareholder's basis in his stock. Any amount received in excess of both earnings and profits of the corporation and the shareholder's basis in his stock is treated as gain from the sale or exchange of property. See *Truesdell v. Commissioner*, 89 T.C. 1280, 1294-1295 (1987). The burden of proof is generally on "taxpayers to establish that the corporation did *not* have earnings and profits equal to the amounts diverted" with respect to deficiencies. *DiZenzo v. Commissioner*, *348 F. 2d 122, 127 (2d Cir. 1965), revg. in part and remanding T.C. Memo. 1964-121; Truesdell v. Commissioner, supra* supra at 1295-1296.

We note that in *DiZenzo v. Commissioner*, T.C. Memo. 1964-121, we held in a factual situation generally analogous to the one now before the Court that corporate funds diverted by the dominant stockholder of a corporation constitute income to him regardless of whether such funds might be treated as a constructive dividend, and that taxability to the stockholder need not turn upon the existence of corporate earnings and profits, i.e., that tax treatment is to be determined under section 61 (a) (gross income defined) rather than section 316 (a) (dividend defined). In *DiZenzo v. Commissioner*, 348 F. 2d 122 (2d Cir. 1965), the Second Circuit (to which an appeal would lie in this case) rejected this approach, noting in passing that in the case before it (as here) the court was not dealing with sums stolen or embezzled by the taxpayer. On arguing for the approach taken by the Tax Court, the government in *DiZenzo* pointed to the difficulty of reconstructing the earnings and profits of the taxpayer in view of the corporation's hopelessly inadequate books and records. The Second Circuit responded that the answer to this problem is not to give a special meaning to the language of section 316 (a), but rather to place the burden on the taxpayers to establish that the corporation did not have earnings and profits equal to the amounts diverted. *DiZenzo v. Commissioner, supra* at 125-127.

We are required to follow the approach taken by the Second Circuit on this issue under the tenets of *Golsen v. Commissioner*, 54 T.C. 742 (1970), affd. 445 F. 2d 985 (10th Cir. 1971), but we also note that this Court in the *Truesdell* case, *supra* at 1295-1296, has taken the same approach as that of the Second Circuit in *DiZenzo*.

Petitioners did not submit any evidence proving that Arcelo did not have earnings and profits equal to the amounts diverted to

Mycek and DiLeo from the secret bank accounts for each of the years in issue. Accordingly, we hold that Mycek and DiLeo understated the dividend income required to be shown on their income tax returns in the amounts set forth in the notices of deficiency.

Mycek's and DiLeo's Fraud

Respondent asserts that all of the underpayment of tax required to be shown on the Myceks' and the DiLeos' income tax returns for the years in issue was due to fraud on the part of Mycek and DiLeo. Petitioners contend that respondent has not proven fraud by clear and convincing evidence. See *supra* at 21 for relevant statutory provisions. Respondent has the burden of proving by clear and convincing evidence that some part of an underpayment for each year in issue was due to fraud. Section 7454 (a); Rule 142 (b).

Respondent states that he may rely upon the doctrine of collateral estoppel (estoppel by judgment) in order to carry his burden of proof on the issue of Mycek's fraud for 1979 and DiLeo's fraud for 1980 and 1982.

A taxpayer is collaterally estopped from denying civil tax fraud under section 6653 (b) when convicted for criminal tax evasion under section 7201 for the same taxable year. *Moore v. United States*, 360 F. 2d 353, 354 (4th Cir. 1966); *Tomlinson v. Lefkowitz*, 334 F. 2d 262, 265 (5th Cir. 1964); *Amos v. Commissioner*, 43 T.C. 50, 55 (1964), affd. 360 F. 2d 358 (4th Cir. 1965). Mycek was convicted of income tax evasion under section 7201 for 1979. DiLeo was convicted of income tax evasion under section 7201 for 1980 and 1982. Therefore, Mycek and DiLeo are collaterally estopped from denying civil tax fraud under section 6653 (b) for those years.

Petitioners, however, contend that "no collateral estoppel exists" because "the transcripts indicate that Mycek and DiLeo pleaded guilty to I.R.C. 7206 (1) and not 7201." The transcripts of Mycek's and DiLeo's allocution hearing submitted into evidence show that Mycek and DiLeo plead guilty to income tax evasion under section 7201. Consequently, we reject petitioners' contention that Mycek and DiLeo pled guilty to willfully subscribing to false returns under section 7206 (1) rather than tax evasion under section 7201.

Respondent bears the burden of proving by clear and convincing evidence that Mycek and DiLeo fraudulently underpaid their income taxes for the years not covered by the criminal convictions

under section 7201. Respondent must establish that (1) the taxpayer has underpaid his taxes for each year; and (2) some part of the underpayment is due to fraud. *Hebrank v. Commissioner*, 81 T.C. 640, 642 (1983).

To prove an underpayment, the Commissioner is not required to establish the precise amount of the deficiency determined by him. However, he cannot discharge his burden by simply relying on the taxpayer's failure to prove error in his determination of the deficiency. *Otsuki v. Commissioner*, 53 T.C. 96, 106 (1969); *Pigman v. Commissioner*, 31 T.C. 356, 370 (1958). It is only if and when the Commissioner establishes an underpayment by clear and convincing evidence that his deficiency determination will enjoy its usual presumption of correctness. See *Compton v. Commissioner*, T.C. Memo. 1983-642; *Cleveland v. Commissioner*, T.C. Memo. 1983-299. As in the usual case, the burden of proof in respect of that determination will then rest with the taxpayer.

Respondent can satisfy his burden of proving the first prong of the fraud test, i.e., underpayment, when the allegations of fraud are interwined with unreported and indirectly reconstructed income in one of two ways. *Parks v. Commissioner*, 94 T.C. at 661. Respondent may prove an underpayment by proving a likely source of the unreported income. *Holland v. United States*, 348 U.S. 121 (1954); *Parks v. Commissioner, supra* at 661; *Nicholas v. Commissioner*, 70 T.C. at 1066. Alternatively, where the taxpayer alleges a nontaxable source, respondent may satisfy his burden by disproving the nontaxable source so alleged. *United States v. Massei*, 355 U.S. 595 (1958); *Parks v. Commissioner, supra* at 661.

Respondent submitted into evidence bank records, deposit slips and checks showing that substantial amounts were deposited into the secret bank accounts. Petitioners stipulated that the secret bank accounts served as a depository for a portion of Arcelo's gross receipts. Petitioners further stipulated that Mycek and DiLeo received funds from the secret bank accounts by their receipt and negotiation of checks made payable to themselves and did not report those funds on their income tax returns. Therefore, respondent has shown by clear and convincing evidence that the Myceks and the DiLeos received constructive distributions from Arcelo by diverting a portion of Arcelo's gross receipts to themselves and did not report the amounts received on their income tax returns.

Respondent determined that the Myceks and the DiLeos under-

paid their taxes for each of the years in issue because the constructive distributions from Arcelo were "dividends" to Mycek and DiLeo. See *Simon v. Commissioner*, 248 F. 2d 869, 873 (8th Cir. 1957); *Chesbro v. Commissioner*, 21 T.C. 123 (1953), affd. 225 F. 2d 674 (2d Cir. 1955).

Petitioners, however, assert that respondent failed to prove any underpayments because dividends are not shown in the absence of an earnings and profits analysis. Respondent states that the constructive distributions from Arcelo to Mycek and DiLeo were dividends because "Arcelo's income tax returns reveal that when the earnings and profits reported by Arcelo are adjusted to reflect the unreported taxable income, income tax liabilities and additions to tax asserted by respondent, there is clearly sufficient earnings and profits to support the subject dividend treatment." *Estate of Stein v. Commisioner*, 25 T.C. 940 (1956), affd. 250 F. 2d 798 (2d Cir. 1958); *Stern Brothers & Co. v. Commissioner*, 16 T.C. 295 (1951).

For convenience, we again quote section 316 (a), which provides in part as follows:

> (a) GENERAL RULE.—*** the term "dividend" means any distribution of property made by a corporation to its shareholders—
>
> (1) out of its earnings and profits accumulated after February 28, 1913, or
>
> (2) out of its earnings and profits of the taxable year*** without regard to the amount of the earnings and profits at the time the distribution was made.

The Internal Revenue Code does not specifically define the phrase "earnings and profits." See B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders, par. 7.03 (5th ed. 1987). Earnings and profits in the tax sense, although the term does not correspond exactly to taxable income, does not necessarily follow corporate tax accounting concepts, either. *Commissioner v. Wheeler*, 324 U.S. 542, 546 (1945).

A corporation's earnings and profits are generally calculated by making certain adjustments to the corporation's taxable income. See section 1.312-6 (a), (b), Income Tax Regs.; see also section 312. The corporation's taxable income is increased by the amount

of any gross receipts which were not included in taxable income. The corporation's taxable income is also increased by the amount of any dividends received deduction claimed in computing taxable income. See *Weyerhaeuser v. Commissioner*, 33 B.T.A. 594, 597 (1935). However, the corporation's taxable income is decreased by the amount of any Federal income tax liability.

The parties submitted into evidence the corporate Federal income tax returns filed by Arcelo for the years in issue. The corporate Federal income tax returns show the amount of taxable income, Federal income tax liability, dividends received deduction and non-deductible insurance premium reported by Arcelo during each of the years in issue. Based on the evidence in the record, Arcelo had the following amounts of current earnings and profits for each of the years in issue:

	1978	1979	1980	1981	1982
Taxable Income	$ 6,121.25	$ 7,907.46	$ - -	$ 5,989.20	$ 4,807.79
Increases					
1. Underreported gross receipts	78,147.52	83,476.90	402,833.35	81,294.61	91,242.68
2. Dividends received deduction	463.25	161.93			
Decreases					
1. Federal tax liability	(1,224.25)	(1,384.27)	- -	- -	(301.21)
2. Insurance premiums	(2,412.45)	(1,332.74)	(1,432.45)	(1,526.47)	(2,638.89)
3. Deficiency	(25,724.76)	(21,959.47)	(25,698.78)	(21,663.52)	(24,384.82)
4. Fraud Additions	- -	(12,862.38)	(10,979.74)	(12,849.39)	(10,831.76)
CURRENT EARNINGS AND PROFITS	$55,370.56	$54,007.43	$64,722.38	$51,244.43	$57,893.79

Respondent has submitted evidence showing that Arcelo had current earnings and profits during each of the years in issue. Accordingly, respondent has shown by clear and convincing evidence that Mycek and DiLeo received dividend income during the years in issue, and, thus, Mycek and DiLeo underpaid their income tax during each of the years in issue.

Respondent contends that the record clearly establishes that Mycek and DiLeo had the specific purpose and intent to evade taxes which they believed to be owing for the years in issue and that the underpayments of tax were due to their intent to evade.

Petitioners counter that no concrete facts have been presented to show that Mycek and DiLeo had an intent to cheat the government.

Fraud is defined as an intentional wrongdoing designed to evade tax believed to be owing. *Professional Services v. Commissioner*, 79 T.C. 888, 930 (1982). Respondent's burden of proving fraud is met if it is shown that the taxpayer intended to evade taxes known to be owing by conduct intended to conceal, mislead or otherwise prevent the collection of taxes. *Stolzfus v. United States*, 398 F. 2d 1002, 1004 (3d Cir. 1968); *Rowlee v. Commissioner*, 80 T.C. 1111, 1123 (1983). The existence of fraud is a question of fact to be resolved from the entire record. *Gajewski v. Commissioner*, 67 T.C. 181, 199 (1976), affd. without published opinion 578 F. 2d 1383 (8th Cir. 1978). The taxpayer's entire course of conduct can be indicative of fraud. *Stone v. Commissioner*, 56 T.C. 213, 224 (1971). Because fraud can rarely be established by direct proof of the taxpayer's intention, fraud may be proved by circumstantial evidence. *Rowlee v. Commissioner*, 80 T.C. 1111, 1123 (1983).

As noted earlier, *supra* at 25, in *Bradford v. Commissioner*, 796 F. 2d 303, 307 (9th Cir. 1986), affg. T.C. Memo. 1984-601, the Ninth Circuit gave a nonexclusive list of circumstantial evidence which may give rise to a finding of fraudulent intent. These badges of fraud include (1) understatement of income; (2) inadequate records; (3) concealment of assets; and (4) engaging in illegal activities. A pattern of consistent underreporting of income, especially when accompanied by other circumstances showing an intent to conceal, justifies the inference of fraud. See *Holland v. United States*, 348 U.S. at 132; *Truesdell v. Commissioner*, 89 T.C. at 1302.

Arcelo's president, Mycek, and secretary/treasurer, DiLeo, opened secret bank accounts which served as a depository for a portion of Arcelo's gross receipts. Mycek and DiLeo withdrew funds from the secret bank accounts over a period of years and did not report the funds withdrawn on their Federal income tax returns. Mycek and DiLeo did not maintain any books or records reflecting transactions made with respect to the secret bank accounts. Mycek was convicted of income tax evasion under section 7201 for 1979. Dileo was convicted of income tax evasion under section 7201 for 1980 and 1982. Under these circumstances, we hold that respondent has established by clear and convincing evidence that the entire underpayment of taxes required to be shown on Mycek's and DiLeo's income tax returns for the years in issue was due to fraud.

Statute of Limitations

Petitioners assert that the assessments against the Myceks and the DiLeos are time barred because they were made after the expiration of the limitations period. Respondent counters that the deficiencies in income tax due from the Myceks and the DiLeos for the years in issue may be assessed and collected pursuant to section 6501 (c) (1).

Section 6501 (a) generally provides that any tax must be assessed within three years after the return is filed. Section 6501 (c), however, provides in part:

> (1) FALSE RETURN.—In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

As discussed above, respondent has established by clear and convincing evidence that Mycek and DiLeo underpaid their taxes for the years in issue and that the underpayments were due to fraud. Accordingly, the statute of limitations does not bar assessment and collection of the deficiencies in income tax due from the Myceks and the DiLeos for the years in issue pursuant to section 6501 (c) (1).

Respondent also asserts that the deficiencies in tax may be assessed and collected pursuant to section 6501 (e) (1). We do not, however, need to consider whether section 6501 (e) (1) applies because section 6501 (c) (1) applies.

Innocent Spouse

Petitioners next assert that Michele Mycek and Mary DiLeo are entitled to "relief from any liability that may be determined herein" because they were innocent spouses within the meaning of section 6013 (e). Respondent counters that Michele Mycek and Mary DiLeo are not entitled to innocent spouse relief under section 6013 (e) on the grounds that (1) petitioners untimely raised this issue for the first time on brief; and (2) petitioners have failed to satisfy their burden of proving that section 6013 (e) is applicable.

It is well settled that issues raised for the first time on brief will not be considered—when to do so prevents the opposing party from presenting evidence that he might have if the issues had been timely raised. *Shelby U.S. Distributors, Inc. v. Commissioner*, 71 T.C. 874, 885 (1979). In their petitions, petitioners did not claim that Michele Mycek and Mary DiLeo were innocent spouses under

section 6013 (e). Respondent states that petitioners formally raised this issue for the first time in their opening brief and did not even advise respondents counsel of their intention to do so until less than two days before trial. Under these circumstances, respondent did not have an opportunity to present evidence with respect to whether Michele Mycek or Mary DiLeo were innocent spouses. Due to unfair surprise and prejudice to respondent, this Court is under no obligation to consider whether Michele Mycek or Mary DiLeo were innocent spouses pursuant to secton 6013 (e).

Nonetheless, even if we were to consider this issue, petitioners have failed to satisfy their burden of proving that section 6013 (e) is applicable. Among other requirements, section 6013 (e) provides that petitioners must show that in signing the returns Michele Mycek and Mary DiLeo "did not know, and had no reason to know, that there was such substantial understatement." Section 6013 (e) (1) (C). Michele Mycek and Mary DiLeo are in the best position to know and may be the only persons who do know whether they did not know and had no reason to know that there was a substantial understatement. Yet, Michele Mycek and Mary DiLeo did not testify at trial. Instead, petitioners rely exclusively on the testimony of Mycek and DiLeo to establish that their spouses did not know or have reason to know of the substantial understatements. We find that Mycek's and DiLeo's testimony is insufficient to prove that their spouses did not know or have reason to know of the substantial understatements. Therefore, Michele Mycek and Mary DiLeo are not entitled to relief from any tax liability under the innocent spouse provisions of section 6013 (e).

Defective Proceeding

Petitioners next assert on brief that these "procedings were so defective that, for that reason alone, the deficiency must be vacated and the petition must be granted." In support of their assertion, petitioners claim that Special Agent Kirschen's participation in these cases was a "flagrant violation" of Rule 6 (e) because *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), bars a person who assisted in a grand jury investigation form participating in a subsequent civil proceeding arising out of the same investigation.

Special Agent Philip B. Kirschen (special agent) of the Internal Revenue Service's Criminal Investigation Division was assigned

to the grand jury investigation of Mycek and DiLeo. The special agent fell within the Rule 6 (e) (3) (A) (ii) discription of "government personnel***deemed necessary***to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Shortly before the trial of this case, respondent's counsel requested the special agent to remove the bank records submitted to the grand jury by Chase, Citibank and CBT from the boxes which contained grand jury records. Therefore, the special agent assisted respondent's counsel in a limited capacity prior to trial.

In *United States v. Sells Engineering, Inc., supra* at 427, the Supreme Court held that attorneys in the Civil Division of the Justice Department and their assistants and staff may not obtain automatic disclosure of grand jury materials under Rule 6 (e) (3) (A) (i), Federal Rules of Criminal Procedure, but must instead seek a Rule 6 (e) (3) (C) (i) court order for access to such materials. The Supreme Court's holding in *Sells Engineering* does not in any way suggest that a person who conducted or assisted in the grand jury investigation is barred from participating in any subsequent civil proceeding arising out of the same investigation. Therefore, petitioners' assertion that *Sells Engineering* bars a person who assisted in a grand jury investigation from participating in a subsequent civil proceeding is without foundation.

Petitioners next assert that respondent had "unfair discovery advantages" due to the special agent's participation in these cases. Petitioners cite our opinions in *Universal Manufacturing Co. v. Commissioner*, 93 T.C. 589 (1989), and *Westreco, Inc. v. Commissioner*, T.C. Memo. 1990-501, in support of their assertion that "unequal access to evidence will not be condoned."

In *Universal Manufacturing* and *Westreco*, we limited respondent's ability to use information in the cases before us which had been previously obtained through the use of administrative summonses because the information developed pursuant to the summonses circumvented our discovery rules and gave respondent a discovery advantage not enjoyed by the taxpayer. In *Ash v. Commissioner*, 96 T.C. 459 (1991), we modified our holdings in *Universal Manufacturing* and *Westreco* by limiting the circumstances in which information obtained through the issuance of administrative summonses will be excluded from the case. Petitioners' reliance on *Universal Manufacturing* and *Westreco* is misplaced because

respondent's use of the special agent did not circumvent our discovery rules or give respondent's counsel an unfair discovery advantage.

Respondent's counsel used the special agent to separate the bank records from the grand jury materials and to obtain copies of judgments of conviction. The record does not contain any evidence indicating that the special agent disclosed information about matters occurring before the grand jury to respondent's counsel in violation of Rule 6 (e). To the contrary, the record shows that respondent's counsel was very careful to avoid asking the special agent any questions which might lead to a disclosure of matters occurring before the grand jury. Consequently, respondent's counsel did not enjoy a discovery advantage by retaining the special agent to assist him.

Petitioners claim nonetheless that "The hollow alibis that Kirschen was not disclosing 6 (e) information to respondent's counsel are betrayed by his role as respondent's representative or respondent's essential person." Respondent counters that "[the special agent's] designation as a representative of respondent***was for very limited purposes and did not involve his disclosure of information in violation of Fed. R. Crim. P. 6 (e)."

Rule 145 (a) provides:

> (a) Exclusion: At the request of a party, the Court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This Rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of such party's cause.

At trial, petitioners requested the Court to exclude all witnesses from the courtroom so that they could not hear the testimony of other witnesses pursuant to Rule 145 (a). This Court permitted the special agent to remain in the courtroom after respondent's counsel designated him as either respondent's "representative" or respondent's "essential" person within the meaning of Rule 145 (a) (2) or (3).

Respondent's designation of the special agent as his representative or essential person under Rule 145 (a) does not establish that

the special agent disclosed information about the grand jury to respondent's counsel in violation of Rule 6(e). Therefore, petitioners have failed to show that respondent's counsel had an unfair discovery advantage by designating the special agent as his representative or essential person.

Accordingly, and to reflect the foregoing,

Decisions will be entered under Rule 155.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WALTER E. MYCEK, JR., *et al.*,

Plaintiffs,

– against –

COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

Defendant.

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89 Civ. 7752 (VLB)

AMENDED MEMORANDUM DECISION

VINCENT L. BRODERICK, U.S.D.J.

My Memorandum Decision dated January 8, 1991 is amended only as to the caption, which is to conform to the above.

SO ORDERED.

[signed]

VINCENT L. BRODERICK, U.S.D.J.

Dated: White Plains, New York
January 15, 1991

Copies have been mailed to:
Chief Judge Arthur Nims
United States Tax Court
400 Second Street, N.W.
Washington, D.C. 20217

Allan Taffet, Esq.
Assistant United States Attorney
Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007

Jared Scharf, Esq.
Westchester Financial Center
Eleven Martine Avenue
White Plains, New York 10606

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

WALTER E. MYCEK, JR.
MICHELE A. MYCEK,
JOSEPH R. DILEO,
MARY A. DILEO, ARCELO
REPRODUCTION COMPANY, INC.,

Plaintiffs,

89 Civ. 7752 (VLB)

- against -

MEMORANDUM DECISION

PETER K. SCOTT, Chief Counsel,
AGATHA L. VORSANGER,
Reginal Counsel,
GERALD A. THORPE,
District Counsel,
CHRISTOPHER B. STERNER,
Attorney,
INTERNAL REVENUE SERVICE,

Defendants.

----------x

VINCENT L. BRODERICK, U.S.D.J.

The United States applied for an order "authorizing the use of certain pre-existing documents obtained by grand jury subpoena in a civil action pending before the United States Tax Court."

This case has entailed such egregious disregard of the obligations of the Government under Rule 6 (e) of the Federal Rules of Criminal Procedure that I deem it necessary to set forth in some detail the development of the case, the manner in which it has reached me, and the reasons why I determined, reluctantly, to grant the application.

The facts are not disputed. [1] During 1980, a grand jury investigation was initiated in this district concerning possible criminal tax violations by Walter E. Mycek, Jr., Joseph R. DiLeo and Arcelo Reproduction company, Inc. In response to subpoenas *duces tecum* issued by the grand jury, the Chase Manhattan Bank, Citibank and the Connecticut Bank and Trust Company provided certain records concerning the bank accounts maintained by Arcelo Reproduction Company, Inc. to the grand jury. The investigation culminated in indictments of both Mycek and DiLeo on several criminal counts.

On May 8, 1984 Mycek pleaded guilty to one count of conspiracy, one count of filing a false tax return for 1980 and one count of making a materially false individual return for 1979. On March 14, 1985 DiLeo pleaded guilty to one count of conspiracy, one count of aiding and assisting the preparation of a false return for Arcelo in 1980, one count of making a materially false income tax return for 1982, one count pertaining to underreporting of individual income taxes for 1980, one count of filing a false individual income tax return for 1982 and one count of making false statements to a federal agent.

Philip B. Kirschen was the special agent of the Criminal Investigation Division of the Internal Revenue Service assigned to assist the United States Attorney's Office and the grand jury during the investigation of Mycek and DiLeo. After Mycek and DiLeo were sentenced in connection with their guilty pleas, the United States Attorney's Office apparently abandoned to the Internal Revenue Service control of all materials gathered in the course of the grand jury investigation. Special Agent Kirschen placed the records collected during the grand jury investigation in sealed boxes and transported those boxes to the Criminal Investigation Division's office in Newburgh, New York. Those boxes were subsequently moved to Albany, New York, where they were held in the Criminal Investigation Division's storeroom at the Leo O'Brien Federal

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[1] Plaintiffs accept the Government's recitation of the facts. See Plaintiffs' *Memorandum of Law in Opposition to Defendant's Application for Authorization to Use in a Civil Proceeding Documents Obtained by Grand Jury Subpoena* at 1.

Building.

During 1986 and 1987, an Internal Revenue Service Revenue Agent, David Prystal, issued three Revenue Agent's reports concerning the income tax returns filed by Mycek, DiLeo and Arcelo. Those reports proposed adjustments that were subsequently incorporated in the notices of deficiencies which became the subjects of three Tax Court actions.[2]

In early December, 1987 the Internal Revenue Service assigned Revenue Agent Daniel Sickles to assist Internal Revenue Service lawyers in the preparation of the Tax Court cases for trial. On December 7 and December 8, 1987, Revenue Agent Sickles served subpoenas *duces tecum* on the Chase Manhattan Bank, Citibank and the Connecticut Bank and Trust Company seeking production of "all books, records or other documents pertaining to Arcelo's . . . Account during the years 1977 through 1983."

On December 22, 1987, at the request of Internal Revenue Service lawyers, Special Agent Kirschen opened the sealed boxes containing the information collected by the grand jury and removed the Chase, Citibank and Connecticut Bank and Trust Company bank records. At the time he removed these records, and until very recently, the Government had not applied to this court for a disclosure order pursuant to Rule 6 (e), F. R. Crim. P. Kirschen redacted any reference to the grand jury and placed the bank records in a separate box with instructions that the contents were to be provided to the Internal Revenue Service lawyers when requested.

By letters dated December 21, 1987, Citibank and Connecticut Bank and Trust company authorized the Internal Revenue Service to obtain and utilize as responsive to the December, 1987 subpoenas, the bank records which had been among the grand jury papers. By letter dated January 4, 1988 Chase similarly authorized the Internal Revenue Service to obtain and utilize the previously produced records.

During the discovery phase of the Tax Court cases the taxpayers in their turn attempted to obtain various documents which had been subpoenaed by the grand jury to use in the litigation. The Internal Revenue Service refused to make these documents available,

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[2] The Tax Court actions are respectively numbered 22366-86 (DiLeo), 22367-86 (Mycek) and 15778-87 (Arcelo).

contending that they constituted matters occurring before the grand jury.

After consolidation, the three Tax Court cases proceeded to trial on January 21, 1988. Mycek and DiLeo moved to suppress the use of the Chase, Citibank and Connecticut Bank and Trust Company records. Following an evidentiary hearing and extensive briefing, Chief Judge Nims of the Tax Court denied the motions, finding that the bank records were not "matters occurring before the grand [jury.]"

On November 21, 1989, Mycek and DiLeo commenced this action requesting that I enjoin the Internal Revenue Service from utilizing the bank records in the Tax Court trial, notwithstanding the ruling by Chief Judge Nims. By Order dated July 9, 1990, I denied the Government's motion to dismiss.

On August 23, 1990, I heard argument on the parties' cross motions for summary judgment. At the conclusion of the argument, I made the following ruling:

> I iterate what I said in the course of the colloquy; that in my judgment the bible for this particular matter is *Sells*,[3] and in *Sells* the Supreme Court made it perfectly clear that 6 (e) had been designed jealously to safeguard activities before the Grand Jury.
>
> The portal through which any deviations from Grand Jury secrecy must pass is the District Judge. Grand Jury materials may not have been made available by the United States Attorney to the Internal Revenue Service, but if they were not made available, they were at least abandoned to the Internal Revenue Service, and no recourse was had at any tme to statutory guidance under Rule 6 (e) or to this court.
>
> The whole matter of whether or not materials used in the tax court case are or are not Grand Jury materials was litigated before the tax court judge.The tax court judge is not an Article III judge and he has no authority to decide that there is a particularized need for Grand Jury materials or to decide that materials are not Grand Jury materials. The only person who is authorized to rule on this matter is a judge of the district court.
>
> 6 (e) does not use those words, but the relationship of the

---

[3] *United States v. Sells Engineering*, 463 U.S. 300 [sic; 418] (1983).

Grand Jury to the district court is such that it is perfectly clear in context that it is the district judge to whom recourse must be had if relief from Grand Jury secrecy is desired.

Section 6 (e) authorizes the district judge to permit Grand Jury materials to be made available to others than those listed in Rule 6 (e) when a particularized need is shown. He implicitly has the power to also find that particular materials are not Grand Jury materials.

I derive from *Sells* the strong conviction that until a district judge has found that a particular material is not Grand Jury material, it cannot be released if it has been obtained subject to a Grand Jury subpoena.

This case is presented to me at a troublesome point and in a troublesome posture. A judge of the tax court has made rulings, has had a trial, and is about to receive, I believe by September 12, final briefs, and there has been presented in the course of that trial documents which are still subject to the mandates of Grand Jury secrecy. I have no desire to interfere with the processes of the tax court. I must insist, however, that the provisions pertaining to Grand Jury secrecy be enforced in this district.

Plaintiffs' motion for summary judgment urges that all the relief sought in the complaint be granted. I am not at this stage prepared to do that.

What I am prepared to do is the following: I will entertain an application to the effect that particular documents are either not matters occurring before the Grand Jury, or if they are matter before the Grand Jury, that there is a particularized need for them which warrants their release.

If such an application is made in sufficient time for me to rule upon it before briefs are due in the tax court action, I shall do my best to rule. If such an application is not made, then I presently rule that no matters or documents that were before the Grand Jury or that were subject to Grand Jury subpoena may be considered in the tax court proceeding. And all such documents will be returned to the custody of the United States Attorney.

Mycek, et al. v. Commissioner of the Internal Revenue Service, No. 89 Civ. 7752 (VLB), Oral Decision, August 23, 1990, transcript at 18-21.

Two weeks later, the Government moved before this court for an order authorizing the use of the bank records in the tax court trial.

Plaintiffs submitted opposition papers within a week thereafter, and the Chief Judge of the Tax Court advised counsel that the parties would not be required to submit post-trial briefs in the tax court proceeding.

By Order dated September 24, 1990, I granted the Government's belated application for an order pursuant to Rule 6 (e) of the Federal Rules of Criminal Procedure. In making that ruling, I considered Chief Judge Nims' careful analysis of the Second Circuit's decision in *United States v. Interstate Dress Carriers*, 280 F. 2d 52 (2d Cir. 1960). I agreed with Chief Judge Nims that the bank records which had been held by the Internal Revenue Service did not constitute materials occurring before the grand jury. But the Tax Court, as a non-Article III Court, does not have jurisdiction to determine that documents produced pursuant to a grand jury subpoena are, or are not matters occurring before the grand jury. Only the district court may make such a determination.

I have found extremely troubling the cavalier disregard, on the part first of the United States Attorney and thereafter on the part of the Internal Revenue Service, for the responsibilities which Rule 6 (e) requires them to shoulder.

[signed]

VINCENT L. BRODERICK, U.S.D.J.

Dated: White Plains, New York
January 8, 1991

Copies have been mailed to:

Chief Judge Arthur Nims
United States Tax Court
400 Second Street, N.W.
Washington, D.C. 20217

Allan Taffet, Esq.
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New York, New York 10007

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Westchester Financial Center
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White Plains, New York 10606

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

WALTER E. MYCEK, JR., *et al.*, :

Plaintiffs, : 89 Civ. 7752 (VLB)

- against - : **ORDER**

COMMISSIONER OF THE INTERNAL REVENUE SERVICE, :

Defendant. :

----------x

VINCENT L. BRODERICK, U.S.D.J.

The United States has applied pursuant to Rule 6 (e) of the Federal Rules of Criminal Prodedure for an order "authorizing the use of certain pre-existing documents obtained by grand jury subpoena in a civil action pending before the United States Tax Court:"

For reasons that I will set forth in a memorandum to follow, I grant the Government's application.

SO ORDERED.

[signed]

VINCENT L. BRODERICK, U.S.D.J.

Dated: White Plains, New York
September 24, 1990

Copies have been mailed to:
Chief Judge Arthur Nims
United States Tax Court
400 Second Street, N.W.
Washington, D.C. 20217

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APPENDIX H

UNITED STATES TAX COURT

JOSEPH R. DiLEO & MARY A. DiLEO et al.,	)	
Petitioners,	)	Docket Nos. 22366-86
v.	)	22367-86
	)	15778-87
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

ORDER

On January 21, 1988, petitioners filed a motion to suppress evidence. Pursuant to the determination of the Court, as set forth in its Opinion filed September 28, 1989, it is

ORDERED that petitioners' motion to suppress evidence is denied. It is further

ORDERED that the parties simultaneously submit opening briefs on the substantive issue, for which trial was held on January 21, 1988, on or before December 12, 1989, and answering briefs on or before January 26, 1990.

(Signed) ARTHUR L. NIMS, III

Arthur L. Nims, III
Chief Judge

Dated: Washington, D.C.
September 28, 1989

APPENDIX I

T.C. Memo. 1989-540

UNITED STATES TAX COURT

JOSEPH R. DiLEO AND MARY A. DiLEO, ET AL.,[1] Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 22366-86
22367-86,
15778-87.

Filed September 28, 1989.

Ps were targeted for grand jury investigation in 1980. In 1984 and 1985, Ps pleaded guilty to various counts of grand jury indictments. R's special agent, who assisted the Assistant United States Attorney in the grand jury proceedings and was on the 6 (e) list, took the grand jury records to his office upon the conclusion of the grand jury proceedings. The special agent, prior to trial, segregated certain bank records from the remaining grand jury records. After district counsel obtained authorization to inspect various bank records from the respective banks, the special agent gave him the grand jury bank records.

Held, the records in issue are not "matters occurring before the grand jury" within the meaning of Rule 6 (e), Federal Rules of Criminal Procedure. *United States v. Interstate Dress Carriers*, 280 F. 2d 52 (2d Cir. 1960), followed. *Golsen v. Commissioner*, 54 T.C. 742 (1970), affd. 445 F. 2d 985 (10th Cir. 1971), applied. Held further, R is not judicially estopped from introducing the bank records at trial.

Jared J. Scharf and *Morton A. Smith*, for the petitioners. *Christopher B. Sterner*, for the respondent.

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[1] Cases of the following petitioners have been consolidated herewith: Walter E. Mycek, Jr. and Michele A. Mycek, docket No. 22367-86; and Arcelo Reproduction Company, Inc., docket No. 15778-87.

MEMORANDUM FINDINGS OF FACT AND OPINION

NIMS, *Chief Judge:* These consolidated cases are before us on petitioners' motion to suppress evidence on the grounds that respondent obtained certain grand jury materials in violation of Rule 6 (e), Federal Rules of Criminal Procedure (Rule 6 (e)).

Respondent determined the following deficiencies in and additions to petitioners' Federal income tax:

			Additions to Tax - Sections		
Petitioners	Year	Deficiency	6653(b)(1)	6653(b)(2)	6661
Joseph R. and	1978	$ 5,068.00	$2,534.00		
Mary A. DiLeo	1979	10,6[illegible].37	5,317.69		
	1980	10,303.75	5,151.87		
	1981	11,157.51	5,578.75		
	1982	12,209.45	6,104.72	*	
Walter E. and Michele	1978	4,681.00	2,340.50		
A. Mycek, Jr.	1979	12,867.89	6,433.94		
	1980	11,405.99	5,703.00		
	1981	5,789.00	2,894.50		
Arcelo Reproduction	1978	25,724.76	12,862.38		
Company, Inc.	1979	21,959.47	10,979.74		
	1980	25,698.78	12,849.39		
	1981	21,663.52	10,831.76		
	1982	24,384.82	12,192.41	**	$6,096.21

* 50 percent of interest due on $12,209.45

**50 percent of interest due on $24,384.82

FINDING OF FACT

Some of the facts have been stipulated. The stipulation of facts and the attached exhibits are incorporated herein by this reference. At the time they filed their petitions, all of the petitioners resided or had their principal place of business in New York.

Petitioner Arcelo Reproduction Company (Arcelo) and petitioners Joseph R. and Mary A. DiLeo (DiLeos) and Walter E. and Michele A. Mycek, Jr. (Myceks) filed corporate or joint income tax returns, respectively, for the years in issue. During the years in issue, Arcelo was engaged in the printing and lithography business. Petitioners Joseph R. DiLeo (DiLeo) and Walter E. Mycek, Jr. (Mycek) were each 50-percent stockholders in Arcelo and its secretary/treasurer and president, respectively. DiLeo and Mycek

were responsible for the day-to-day operations of Arcelo and the maintenance of its books and records.

On the following dates, DiLeo and Mycek opened checking accounts in the name of Arcelo to serve as depositories for Arcelo's gross receipts:

Date Account Opened	Bank	Account No.
June 21, 1977	Chase Manhattan Bank (Chase)	408-1-018923
October 12, 1979	Citibank	1620-9247
August 17, 1981	Connecticut Bank and Trust Co. (CBT) (formerly known as State National Bank of Connecticut)	1-665098-8
December 14, 1982	Bank Mart (Mart) (formerly known as Bank One)	699-876

The deposits to the Chase, Citibank and CBT accounts were not included in the gross receipts reported by Arcelo on its income tax returns filed for the taxable years 1978 through 1982. During the taxable years 1978 through 1982, DiLeo received funds from Chase, Citibank and CBT accounts in the form of checks made payable to him on those accounts. Similarly, Mycek received funds from the same accounts in the same manner during the taxable years 1978 through 1981. Neither the Myceks nor the DiLeos reported any of the funds received on their income tax returns filed for the years in issue.

In October, 1980, a grand jury investigation was initiated in the United States District Court for the Southern District of New York which eventually considered possible criminal tax violations by DiLeo and Mycek. During the course of its investigation, the grand jury issued subpoenas duces tecum to Chase, Citibank and CBT. In response to these subpoenas, Chase, Citibank and CBT provided to the grand jury records which the respective banks maintained concerning their accounts. The subpoenaed records are marked exhibits 28-AB through 36-AJ.

Special Agent Philip B. Kirschen (the special agent) of the Internal Revenue Service's Criminal Investigation Division (CID) was assigned in October, 1980, to the grand jury investigation. The special agent fell within the Rule 6 (e) (3) (A) (ii) description of "government personnel***deemed necessary*** to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law," in this case Assistant United States

Attorney Martin Perschetz, who was conducting the grand jury investigation.

On; or about March 28, 1984, Mycek was indicted by the grand jury. Count six or the indictment stated in pertinent part the following:

> 2. On various dates in 1978, WALTER E. MYCEK, JR., the defendant, withdrew for his personal use approximately $14,654.00, from account number 408-1-018923 in the name of Arcelo Reproduction Company, Inc. at Chase Manhattan Bank, Elmsford, New York. The defendant MYCEK unlawfully, wilfully and knowingly failed to report said $14,654.00 on the joint income tax return of himself and his wife for calendar year 1978.

Count seven of the indictment stated in pertinent part the following:

> 2. On various dates in 1979, WALTER E. MYCEK, JR., the defendant, withdrew for his personal use approximately $30,627.26, from account number 408-1-018923 in the name of Arcelo Reproduction Company, Inc. at Chase Manhattan Bank, Elmsford, New York. The defendant MYCEK unlawfully, wilfully and knowingly failed to report said $30,627.26 on the joint income tax return of himself and his wife for calendar year 1979.

Count eight of the indictment stated in pertinent part the following:

> 2. On various dates in 1980, WALTER E. MYCEK, JR., the defendant, withdrew for his personal use approximately $29,980.00, from bank accounts in the name of Arcelo Reproduction Company, Inc., to wit, approximately $3,350.00 withdrawn from account number 408-1-018923 at Chase Manhattan Bank, Elmsford, New York, and approximately $26,630.00 withdrawn from account number 1620-9427 at Citibank, Elmsford, New York. The defendant MYCEK unlawfully, wilfully and knowingly failed to report said $29,980.00 on the joint income tax return of himself and his wife for calendar year 1980.

Count nine of the indictment stated in pertinent part the following:

2. On various dates in 1981, WALTER E. MYCEK JR.,the defendant, withdrew for his personal use approximately

$18,542.16, from bank accounts in the name of Arcelo Reproduction Company, Inc., to wit, approximately $600.00 withdrawn from account number 401-1-018923 at Chase Manhattan Bank, Elmsford, New York, approximately $17,942.16 withdrawn from account number 1620-9247 at Citibank, Elmsford, New York. The defendant MYCEK unlawfully, wilfully and knowingly failed to report said $18,542.16 on the joint income tax return of himself and his wife for calendar year 1981.

On or about May 8, 1984, Mycek pleaded guilty to counts 1, 4 and 7 of the indictment and counts 2, 3, 5, 6, 8 and 9 were dismissed.

On or about January 23, 1985, DiLeo was indicted by the grand jury. Count one of the indictment stated in pertinent part the following:

6. It was a further part of this conspiracy that the defendant JOSEPH R. DILEO and Walter E. Mycek, Jr. would and did deposit, form 1977 through 1982, a total of approximately $466,478.15 of Arcelo's business receipts into said Chase Manhattan, Citibank, State National Bank of Connecticut and Bank One accounts, keep these receipts and deposits secret and concealed from Arcelo's accountant and the Internal Revenue Service, and fail to report these receipts and deposits as income on the corporate income tax returns of Arcelo. The amounts of these receipts and deposits for each of the years 1977 through 1982 were as follows:

Chase Manhattan	1977	1978	1979	1980
	$29,483.09	$78,147.52	$80,865.62	$ 7,992.47
	1981	1982		
	$7,466.23			
Citibank	1977	1978	1979	1980
			$2,611.28	$94,841.18
	1981	1982		
	$46,232.42			
State National Bank of Connecticut	1977	1978	1979	1980
	1981	1982		
	$27,595.96	$83,087.54		
Bank One	1977	1978	1979	1980
	1981	1982		
		$8,155.14		
TOTALS	1977	1978	1979	1980
	$29,483.09	$78,147.52	$83,476.90	$102,833.35
	1981	1982		
	$81,294.61	$91,242.68		

Count seven of the indictment stated in pertinent part the following:

2. On various dates in 1978, JOSEPH R. DILEO, the defendant, withdrew for his personal use approximately $14,745.00 from account number 408-1-018923 in name of Arcelo Reproduction Company, Inc. at Chase Manhattan Bank, Elmsford, New York. The defendant DILEO unlawfully, wilfully and knowingly failed to report said $14,745.00 on the joint income tax return of himself and his wife for calendar year 1978.

Count eight of the indictment stated in pertinent part the following:

2. On various dates in 1979, JOSEPH R. DILEO, the defendant, withdrew for his personal use approximately $28,169.33 from account number 408-1-018923 in name of Arcelo Reproduction Company, Inc. at Chase Manhattan Bank, Elmsford, New York. The defendant DILEO unlawfully, wilfully and knowingly failed to report said $28,169.33 on the joint income tax return of himself and his wife for calendar year 1979.

Count nine of the indictment stated in pertinent part the following:

2. On various dates in 1980, JOSEPH R. DILEO, the defendant, withdrew for his personal use approximately $30,824.51 from bank accounts in the name of Arcelo Reproduction Company, Inc., to wit, approximately $2,000.00 withdrawn from account number 408-1-0118923 at Chase Manhattan Bank, Elmsford, New York, and approximately $28,824.51 withdrawn from account number 1620-9247 at Citibank, Elmsford, New York. The defendant DILEO unlawfully, wilfully and knowingly failed to report said $30,824.51 on the joint income tax return of himself and his wife for calendar year 1980.

Count ten of the indictment stated in pertinent part the following:

2. On various dates in 1981, JOSEPH R. DILEO, the defendant, withdrew for his personal use approximately $29,125.00 from bank accounts in the name of Arcelo Reproduction Company, Inc., to wit, approximately $2,400.00 withdrawn from account number 408-1-018923 at Chase Manhattan Bank, Elmsford, New York, approximately $16,050.00 withdrawn from account number 1620-9247 at Citibank, Elmsford, New York,

and approximately $10,675.00 withdrawn form account number 1-66509-8 at State National Bank of Connecticut, Greenwich, Connecticut. The defendant DILEO unlawfully, wilfully and knowingly failed to report said $29,125.00 on the joint income tax return of himself and his wife for calendar year 1981.

Count eleven of the indictment stated in pertinent part the following:

2. On various dates in 1982, JOSEPH R. DILEO, the defendant, withdrew for his personal use approximately $30,740.00 from account number 1-66509-8 in the name of Arcelo Reproduction Company, Inc., at the State National Bank of Connecticut, Greenwich, Connecticut. The defendant DILEO unlawfully, wilfully and knowingly failed to report said $30,740.00 on the joint income tax return of himself and his wife for calendar year 1982.

On or about March 14, 1985, DiLeo pleaded guilty to counts 1, 4, 6, 9, 11 and 12 of the indictment and counts 2, 3, 5, 7, 8 and 10 were dismissed.

After the Mycek and DiLeo criminal cases were closed in March, 1985, the special agent went to the United States Attorney's Office in One St. Andrews Plaze, New York City, placed all of the grand jury records in boxes and took them to his CID office in Newburgh, New York. Thereafter, the special agent sealed and labeled the grand jury records in several boxes. The special agent's CID group manager determined that the grand jury records should be sent to the Internal Revenue Service facility management area located in the basement of the Leo O'Brien Federal Building at Albany, New York. Sometime between July and September, 1985, the grand jury records were picked up by an Internal Revenue Service employee from Albany, New York, at the CID Newburgh office and transported to the Leo O'Brien Federal Building. The grand jury records were then placed in the building's Internal Revenue Service facility management area. The grand jury records were stored in a room located in the back of the facility management area. The records were placed inside a cage within the room, and a key for the cage was maintained by the CID in Albany.

On or about March 3, 1986, Revenue Agent David Prystal was assigned to examine the Myceks' and DiLeos' income tax returns for the years in issue. Revenue Agent Prystal was given the grand jury indictments of Mycek and DiLeo by his group manager to

assist him in his preparation of revenue agent reports. Revenue Agent Prystal closed his examinaton of the Myceks' and DiLeos' returns on March 14, 1986. Respondent issued statutory notices of deficiency to the Myceks and DiLeos on March 26, 1986. Attached to each statutory notice was a statement of income tax changes (Form 5278) which listed the following adjustments to income under the heading "Constructive Dividend:"

Petitioners	Year	Amount
Walter E. and Michele A. Mycek, Jr.	1978	$14,654
	1979	20,627
	1980	29,980
	1981	18,542
Joseph R. and Mary A. DiLeo	1978	14,745
	1979	28,169
	1980	30,825
	1981	29,125
	1982	30,740

These amounts equalled those in the indictments described previously.

On June 23, 1986, the Myceks and DiLeos timely filed their respective petitions.

On December 7, 1986, Revenue Agent Prystal was assigned to examine Arcelo's income tax returns for the years in issue. Revenue Agent Prystal used the Mycek and DiLeo grand jury indictments to assist him in his preparation of a revenue agent report. He closed his examination of Arcelo's returns on February 26, 1987. Respondent issued two notices of deficiency to Arcelo on March 6, 1987. The first notice covered 1980, and the second notice covered 1978, 1979, 1981 and 1982. Attached to each statutory notice was a statement of income tax changes (Form 5278) which listed the following adjustments to income under the heading "Gross Receipts:"

Year	Amount
1978	$ 78,147.52
1979	83,476.90
1980	102,833.35
1981	81,294.61
1982	91,242.68

These amounts exactly equalled those in paragraph 6, count one of the DiLeo indictment described previously.

On June 3, 1987, Arcelo timely filed its petition.

The reports prepared by Revenue Prystal were used as the basis for preparing the statutory notices.

On August 5, 1987, Revenue Agent Prystal was assigned to assist respondent's counsel, Christopher B. Sterner (district counsel), in preparation of these cases for trial.

On August 11, 1987, the Mycek and DiLeo cases, docket Nos. 22367-86 and 22366-86, respectively, were set for trial at the trial session beginning on January 11, 1988, at New York City.

On December 2, 1987, Revenue Agent Daniel Sickles was assigned to assist district counsel in his preparation of these cases for trial.

On December 7, 1987, Revenue Agent Sickles served subpoenas duces tecum on Chase and Citibank which required them to produce all books, records or other documents for the years 1977-1983 pertaining to the Chase and Citibank accounts, respectively, at the call of calendar on January 11, 1988. On December 8, 1987, Revenue Agent Sickles served a subpoena duces tecum on CBT which required it to produce all books, records or other documents for the years 1977-1983 pertaining to the CBT account at the call of calendar on January 11, 1988.

On December 10, 1987, Revenue Agent Sickles reviewed respondent's administrative files concerning these cases and observed that they contained no records maintained by Chase, Citibank or CBT with respect to the Chase, Citibank or CBT accounts, respectively.

On December 20,1987, district counsel requested that the special agent come from Newburgh to the O'Brien Federal Building in Albany to remove the grand jury records from the CID storage cage in the building's basement. On December 22, 1987, the special agent went to the O'Brien Federal Building, removed all of the sealed boxes containing the grand jury records from the basement storage cage and took them upstairs to the CID office on the fifth floor. The special agent opened all of the boxes and removed the Chase, Citibank and CBT records that district counsel had requested. The special agent removed the bank records from the binders in which he had placed them for grand jury purposes, and pulled the bank microfilm records off of their grand jury exhibit backings, which had been in the binders. Next, he inventoried the bank microfilm records and placed all of the records in one separate box. Those remaining grand jury records which district counsel had

not requested were resealed in their original boxes and given to a CID tax fraud investigative aide who returned them to the basement storage cage. The special agent gave the box containing the Chase, Citibank and CBT records to a secretary in CID and instructed her that district counsel or someone from his office would call for the box. The special agent provided district counsel with an inventory list of the records which the box contained.

On December 23, 1987, district counsel received a letter, via Federal Express, dated December 21, 1987, from CBT in response to the subpoena duces tecum, which authorized respondent to review the records it had previously provided to the grand jury in lieu of reproducing these documents a second time.

On December 24, 1987, district counsel received a letter dated December 21, 1987, from Citibank in response to the subpoena duces tecum authorizing respondent to obtain the records it had previously provided to the grand jury.

On December 28, 1987, district counsel gave Revenue Agent Sickles the CBT and Citibank records. Revenue Agent Sickles, with the assistance of a paralegal, analyzed the records relative to deposits and withdrawals and prepared summaries between December 28, 1987, and January 6, 1988.

On January 5, 1988, district counsel received a letter dated January 4, 1988, via Airborne, from Chase in response to the subpoena duces tecum authorizing respondent to obtain the records which it had previously provided to the grand jury. On January 5, 1988, Revenue Agent Sickles went to the CID office in the O'Brien Federal Building and obtained the Chase records. With the assistance of the paralegal, Revenue Agent Sickles analyzed the Chase records and prepared a summary of deposits and withdrawals by January 6, 1988.

OPINION

Petitioners move in these cases to suppress certain evidence which they claim was obtained in violation of Rule 6 (e), Federal Rules of Criminal Procedure. The issues we must decide are (1) whether the Chase, Citibank and CBT records (exhibits 28AB through 36-AJ) that were submitted to the grand jury and later provided to respondent are "matters occurring before the grand jury," the disclosure of which is prohibited without a valid court order under Rule 6 (e); and (2) if so, whether valid authorization allowing respondent to use the records was obtained prior to the examination of such records.

Rule 6 (e) codifies the traditional rule of secrecy of grand jury proceedings and provides in relevant part:

(e) Recording and Disclosure of Proceedings:

* * * * *

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph 3 (A) (ii) of this subdivision shall not disclose matters occurring before the grand jury except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

* * * * *

(The foregoing provisions of Rule 6 (e) have not, as of the date of this Opinion, been revised since the Supreme Court decided *United States v. Baggot*, 463 U.S. 476 (1983), and *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), nor since the taxable years in issue.)

Respondent concedes that, aside from the participation of the special agent in the grand jury proceedings, none of the exceptions to the general rule of secrecy found in Rule 6 (e) (3) are applicable. However, respondent contends that the Chase, Citibank and CBT records are not "matters occurring before the grand jury." If they are not, then Rule 6 (e) is inapplicable, and respondent did not need a court order to inspect or use them. Petitioners assert that the bank records constitute "matters occurring before the grand jury." Petitioners thus contend that respondent's use of these records without obtaining a 6 (e) order violates Rule 6 (e). We agree with

respondent.

Preliminarily, we note that petitioners concede that the revenue agent did not use either the Chase, Citibank or CBT records in his preparation of the reports which provided the basis for the statutory notices. See *United States v. Baggot, supra*. The record fully supports petitioners' concession.

The DiLeo and Mycek indictments are public records and were used by Revenue Agent Prystal in preparing his reports, as evidenced by the fact that the exact amounts listed in the statements of income tax changes (Forms 5278) as constructive dividends or gross receipts, which provided the basis for the DiLeo, Mycek and Arcelo statutory notices, are to be found in the indictments. Furthermore, on the basis of the testimony of the special agent and Revenue Agent Prystal, which we found credible, and the fact that Prystal's reports exactly track material contained in the indictments, we conclude that Revenue Agent Pryatal did not have access to nor did he use the grand jury records stored in the Leo O'Brien Federal Building. See *Berkery v. Commissioner*, 91 T.C. 179 (1988), affd. 872 F. 2d 411 (3d Cir. 1989).

Now we turn to the issue of whether the bank records constitute "matters occurring before the grand jury" as contemplated by Rule 6 (e). The Second Circuit addressed comprehensively the requirements of Rule 6 (e) in *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960).Since appeal in the instant case lies in the Second Circuit, we are required by *Golsen v. Commissioner*, 54 T.C. 742 (1970), affd. 445 F. 2d 985 (10th Cir. 1971), to follow the law of the case of *Interstate Dress Carries*.

Petitioners assert that we should not follow *Interstate Dress Carriers* because (1) *Interstate Dress Carriers* predates and was implicity overruled by the Supreme Court's decisions in *United States v. Sells Engineering, Inc., supra*, and *United States v. Baggot, supra;* and (2) subsequent circuit court opinions, applying *Baggot* and *Sells*, question the reasoning of *Interstate Dress Carriers*, and therefore "it appears reasonable to forecast that the Second Circuit may overrule its decision therein." We are not persuaded by petitioners' contentions.

First, it is true that *Interstate Dress Carriers* predates *Baggot* and *Sells* by 23 years. However, those decisions do not ovverrule *Interstate Dress Carriers*, nor do they criticize its reasoning. In *United States v. Baggot, supra* at 477, the Supreme Court held

that a civil tax audit is not "preliminary[y] to or in connection with a judicial proceeding" within the meaning of Rule 6 (e) (3) (C) (i). In *Sells* the Court held that Rule 6 (e) was not intended to grant free access to grand jury materials to attorneys other than those involved in the criminal investigation to which the grand jury materials pertained. In each instance, the Court was not presented with the issue of what constitutes "matters occurring before the grand jury" under Rule 6 (e). See *In re Grand Jury Proceedings*, 851 F. 2d 860, 865 (6th Cir. 1988). Petitioners' assertion that *Baggot* and *Sells* implicitly overruled *Interstate Dress Carriers* is thus unfounded.

Second, we recognize that petitioners are correct in asserting that, post-*Baggot* and *Sells*, the Second Circuit's reasoning in *Interstate Dress Carriers* has not uniformly been followed by other circuit courts of appeal. See *In re Grand Jury Proceedings*, *supra* at 863-865 (3d, 6th, 7th and D.C. Circuits following different standards). However, we are not persuaded that the Second Circuit would overrule the case if presented the issue.

This Court had in the past on occasion distinguished precedent of a given circuit court to which appeal would lie if the development of the law since the rendering of the circuit court's opinion strongly indicates that the opinion is "stale" and no longer likely to be followed as precedent. See, e.g., *Kent v. Commissioner*, 61 T.C. 133 (1973). In the instant case, *Interstate Dress Carriers* has not been expressly and unequivocally overruled by the Second Circuit. Most significantly, the Second Circuit itself has chosen not to overrule *Interstate Dress Carriers*, and appears rather to have given it tacit affirmation. See, e.g., *H.L. Hayden Co. of New York, Inc. v. Siemens Medical*, 797 F. 2d 85, 88 (2d Cir. 1986); *United States v. Lartey*, 716 F. 2d 955, 964 (2d Cir. 1983); *United States v. Weinstein*, 511 F. 2d 622, 627 n.5 (2d Cir. 1975). Accordingly, in this case we shall follow and apply the Second Circuit's opinion in *Interstate Dress Carriers*, under the rule of *Golsen*, *supra*.

Interstate Dress Carriers, Inc., *supra* at 53, establishes that "matters occurring before the grand jury" cannot be disclosed without a 6 (e) order. Grand jury records which are found not to be "matters occurring before the grand jury" may be inspected by persons other than the grand jury and the prosecuting attorneys with either "the consent of the [grand jury records'] owner or upon a court order." *United States v. Interstate Dress Carriers, Inc.*, *supra* at 54.

When examining whether or not grand jury records constitute "matters occurring before the grand jury," the Second Circuit stated:

> Thus, when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury. [*United States v. Interstate Dress Carriers, Inc., supra* at 54.]

In the instant case, we find that the Chase, Citibank and CBT records were sought by respondent for their intrinsic value and not to learn what took place before the grand jury. The records reflect the deposits and withdrawals which DiLeo and Mycek made with respect to the accounts at each financial institution, and nothing further. Thus, under the standard enunciated in *Interstate Dress Carriers*, the records in dispute are not matters occurring before the grand jury.

The second prong of our inquiry, as directed by the Second Circuit's approach, is whether respondent had either the consent of Chase, Citibank and CBT or a court order authorizing his inspection of the bank records *Interstate Dress Carriers, supra*. Respondent did not have a court order, nor did he attempt to obtain one. However, Chase, Citibank and CBT gave respondent consent to inspect their respective bank records. Respondent served the banks with subpoenas duces tecum and received letters authorizing use of the records prior to Revenue Agent Sickle's analysis of the records.

Petitioners contend that a violation of Rule 6 (e) occurred when the special agent left the box containing the bank records with the CID secretary, before district counsel obtained the letters of authorization from the banks. The special agent's actions did not violate Rule 6 (e). The secretary's brief possession of the box was purely ministerial in nature, and petitioners have failed to present any evidence that her possession of the box violated the principle of grand jury secrecy. *United States v. Lartey, supra*. We find respondent's actions to be in accord with the guidelines established by the Second Circuit.

Petitioners further assert that respondent should be judicially estopped from contending that the Chase, Citibank and CBT records are not "matters occurrng before the grand jury" because respondent informed petitioners, in response to a discovery request, that other

nonparty grand jury records were "matters occurring before the grand jury" which respondent could not obtain. We do not agree.

The Court may apply the doctrine of judicial estoppel (also known as the duty of consistency) where it is deemed appropriate to prevent a party "from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." *Reynolds v. Commissioner*, 861 F. 2d 469, 472 (6th Cir. 1988), revg. T.C. Memo. 1987-261; *Arkansas Best Corp. v. Commissioner*, 83 T.C. 640, 658-660 (1984), revd. on another issue 800 F. 2d 215 (8th Cir. 1986), affd. 485 U.S. 212 (1988). Respondent is not taking inconsistent positions in two or more proceedings. Therefore, the doctrine of judicial estoppel is not appropriate in the instant case.

Petitioners contend that the only available copies of certain records essential to their cases are contained in the sealed boxes of grand jury records. Petitioners allege that respondent is using Rule 6 (e) as a "sword and a shield" to prevent petitioners from substantiating deductible expenses. DiLeo and Mycek filed their petitions on June 23, 1986. Arcelo filed its petition on June 3, 1987, and the Mycek and DiLeo cases were set for trial on August 11, 1987. DiLeo and Mycek, both 50-percent stockholders of Arcelo, had adequate opportunity to file an ex parte 6 (e) motion in the United States District Court for the Southern District of New York demonstrating "particularized need" for the grand jury records under *Baggot* and *Sells*. See *Kluger v. Commissioner*, 91 T.C. 969, 977-979 (1988); *Arc Electrical Construction Co. v. Commissioner*, 91 T.C. 947,954 (1988); *Bell v. Commissioner*, 90 T.C. 878, 908 (1988). Accordingly, we refrain from applying judicial estoppel in the instant case.

An order will be issued denying petitioners' motion to suppress evidence on the grounds that respondent obtained grand jury materials in violation of Rule 6 (e).

An appropriate order will be issued.

APPENDIX J

UNITED STATES TAX COURT

JOSEPH R. DiLEO & MARY A. DiLEO	)	
Petitioners,	)	Docket Nos. :22366-86
v.	)	22367-86
	)	16778-87
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

Room 206
Jacob K. Javits Federal Bldg.
26 Federal Plaza
New York, New York

Monday, February 29, 1988

The above-entitled matter came on, pursuant to notice, at 2:37 p.m.

BEFORE: HON. ARTHUR L. NIMS, III
Judge

APPEARANCES:

On behalf of Petitioners:

JARED J. SCHARF, ESQ.
Westchester Financial Center
Eleven Martine Avenue
White Plains, New York 10606

On behalf of Respondent:

CHRISTOPHER B. STERNER, ESQ.
Office of Chief Counsel
Clinton Avenue and North Pearl Street
Albany, New York 12207

DIRECT EXAMINATION

BY MR. STERNER:

Q. Mr. Kirschen, tell us by whom you are employed.

A. I'm employed as a special agent with the criminal division of the Internal Revenue Service.

Q. How long have you been employed in that position?

A. Approximately 18 years.

Q. Did there come a time when you were assigned the responsibility concerning a criminal investigation of Mr. Mycek and Mr. DiLeo?

A. Yes, sir.

Q. Could you tell us when that assignment was made?

A. That assignment occurred approximately October of '86 when the tax division of the Department of Justice authorized a grand jury investigation of an individual by the name of Robert Petty.

The Mycek and DiLeo investigations were expanded targets of that grand jury investigation.

Q. You mentioned this was during 1986.

A. I'm sorry. I misspoke. It was 1980.

Q. Could you tell us what happened to the materials that were collected during that investigation after the investigation was closed out?

A. After the criminal features were disposed of, I personally went down to the office here in the Southern District of New York, to One St. Andrews Plaza, and boxed up all of the records that we had accumulated during the course of the grand jury investigation and brought them back with me to my office in Newberg, New York where they were stored in a record room. They remained there for a brief period of time.

Thereafter I sealed them in a box—actually several boxes—labled them and they were picked up by an individual who works for the Internal Revenue Service in Albany and they were transported to be stored in the basment of Leo O'Brien Federal Building.

Q. In what type of room were they stored at the Leo O'Brien Building?

A. The room is in the basement, in the back of what is referred

to as the facility management area where there are things such as furniture and so forth. It is a separate room inside of this big area, a warehouse, if you will. There's a door leading in and then a cage inside that and the key for that is maintained by the criminal investigation division in Albany.

Q. Do these records that you're referring to include records concerning the bank accounts maintained by Arcelo Reproduction Company with City Bank, the Connecticut Bank and Trust Company and the Chase Manhattan Bank?

A. That's right.

Q. Did there come a time when I requested you to do anything with respect to the bank records—those of Chase Manhattan, City Bank and Connecticut Bank and Trust?

A. Yes. You requested that I extract those records, remove any reference to the grand jury from those records and place them in a separate box and leave them there for you to pick up. That ocurred in Albany.

Q. What date did you actually comply with that request?

A. I believe it was December 27th, 1987, if my memory serves me correctly. Certainly the last week or so of December.

MR. STERNER: Your Honor, if I might have just a moment?

THE COURT: Yes.

MR. STERNER: Thank you for the courtesy, Your Honor.

BY MR. STERNER:

Q. Mr. Kirschen, I'm going to show you a document to refresh your recollection.

(Document proffered to witness.)

A. Yes.

Q. When I asked you on what date you complied with my request you indicated it was the 27th. Have you refreshed your recollection concerning that?

A. Yes, I have. It was actually the 22nd.

Q. Thank You.

When you opened the boxes and segregated the bank records at my request, could you tell us what condition those bank records were in?

A. Well, the box itself and the records therein appeared to be in the same condition as they were when I sealed them. I sealed them with nylon tape and the boxes did not appear to be disturbed and when I opened the boxes it appeared to me it was for the first time.

The records were still mounted in the same binders that I had mounted the exhibits in for the grand jury and, of course, for trial if it had gone that far.

Q. Did you remove them from those bindings?

A. Yes, I took the binders apart and pulled the bank microfilm records off of the exhibit backings and so forth and they were already assembled and I just merely inventoried them and I think I provided you with an inventory list of what they consisted of.

Q. Was there any other time period or any other occassion when you provided any of these bank records to someone connected with these cases, the civil cases?

A. No.

MR. STERNER: No further questions, Your Honor.

THE COURT: Mr. Scharf?

MR. SCHARF: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. SCHARF:

Q. Mr. Kirschen, you were assigned to this grand jury investigation in October of 1980?

A. Yes, sir.

Q. And you were the agent assigned to assist the assistant U.S. attorney who was conducting the grand jury investigation?

A. That's correct.

Q. In other words, you were the agent prescribed in Rule 6(e) of the Federal Rules of Criminal Procedure?

A. That would be correct.

Q. And therefore I take it this was not a CID investigation or an administrative investigation. This was an investigation conducted by a grand jury.

A. The portion of the investigation that pertains to Mycek and DiLeo was solely grand jury. The Petty investigation, which is the investigation that led into Mycek and DiLeo originally began as an administrative investigation.

An SAR had been rendered for a particular number of years and it was recommended in the SAR that consideration be given to expand the investigation to some subsequent years because of the failure of certain witnesses to cooperate.

When the case went through the tax division for review, they—

Q. All I asked was whether or not his was a grand jury investigation.

A. Mycek and DiLeo were, yes.

Q. And that grand jury was under the jurisdiction of the United States District Court for the Southern District of New York?

A. Yes, sir.

Q. As conducted by an assistant United States attorney across the street?

A. Yes, sir.

Q. Marty Perschetz?

A. That's correct.

Q. Therefore during the time that you were working on this grand jury investigation, you were not answerable to your supervisors within your CID group and within the division, were you?

A. That's not true, I was answerable to them.

Q. Were you answerable to the Commissioner?

A. Commissioner of Internal Revenue?

Q. Yes.

A. I don't know but to answer your question more specifically my group supervisor, as well as certain individuals in our division, were placed on the 6(e) list.

Q. That's what I'm getting at. You were answerable to such of your supervisors as were on the 6(e) list filed in the District Court across the street?

A. That's right.

THE COURT: Excuse me just a minute. What do you mean by the 6(e) list?

THE WITNESS: There were other individuals that were advising the Court, that had access to the information, so when it was necessary for someone to have access to the information or parts of the investigation, that would be reported to the Court through the assistant U.S. attorney.

For example, in reviewing this matter, reviewing the request for a grand jury, routinely the agent, the group manager, the secretaries or anyone who has access to the information even in a clerical sense, typing up responses and so forth, is placed on a 6(e) list which is reported to the District Court.

THE COURT: Is that your understanding?

MR. STERNER: Yes, Your Honor. I believe the law requires that a list be kept of all persons to whom grand jury disclosures are made, including interpreters, other expert witnesses, whoever

it may be, as well as IRS personnel or other administrative personnel.

BY MR. SCHARF:

Q. From July of '85 when you removed the records from Foley Square to Newburg, until December of '87, who owned those bank records for Arcelo Reproduction Company's bank accounts?

[colloquy ommitted]

BY MR. SCHARF:

Q. Mr. Kirschen, how were these records first obtained?

A. By subpoena.

Q. Who issued the subpoena?

A. The grand jury.

Q. That was a subpoena issued by the U.S. District Court for the Southern District of New York?

A. Yes, sir.

Q. And who produced the records in response to the subpoenas?

A. The banks did.

Q. CBT— which was formerly known as State National Bank of Connecticut?

A. That's correct.

Q. City Bank?

A. That's correct.

Q. And Chase Manhattan?

A. That's correct.

Q. At the time you transported these records to Newburgh, was the grand jury investigation concluded?

A. Yes.

Q. And those records were no longer needed for criminal purposes?

A. All the targets had already pled guilty or found guilty by trial.

Q. Did the assistant—

THE COURT: Wait. Was there a trial?

THE WITNESS: No in this particular matter, for these two targets. In fact, none of the targets went to trial. They were all found guilty— I mean they all pled guilty.

BY MR. SCHARF:

Q. So there was no longer any need for these records for criminal purposes.

A. That's right.

Q. Did the assistant U.S. attorney authorize the removal of the records from the Foley Square courthouse to Newburg?

A. Yes.

Q. And to your knowledge was there a 6(e) order that authorized removal of the records to Newburg?

A. I don't know if there was one but I'm also not sure if one was required.

Q. I'm not asking if one was required. I'm just asking if there was one.

A. I really don't know.

Q. What was the purpose of removing the records to Newburgh, if you know?

A. Quite frankly, the U.S. attorney's office was done with the records and did not want them anymore and as a matter of procedure we take the records back and store them, segregate them and store them and eventually they wind up in a federal records center.

Q. At some time in or after July of 1985, the records were removed from Newburgh to Albany?

A. That's right.

Q. And is Albany within the Southern District of New York?

A. No, it's in the Northern District.

Q. Do you know the month when the records were removed from Newburg to Albany?

A. I don't recall exactly but we keep a log in our Newburg office when the files leave Newburg and go to Albany. Certainly I could find out.

Q. What's your best estimate?

A. Not too long after that, or certainly around that time.

Q. July or August or September of '85?

A. Something like that.

Q. And to your knowledge at the time the records were removed from Newburg to Albany, do you know if there was a 6(e) order authorizing the removal of the records from this judicial district?

A. I don't know.

Q. Was Mr. Perschetz, the assistant U.S. attorney, consulted with regard to that removal?

A. From Newburg to Albany, no, he was not.

Q. Who authorized the removal of the records from Newburg to Albany?

A. My group manager.

Q. And was he on the 6(e) list, if you recall?

A. Yes.

Q. Now you mentioned that the records normally would go to a government record retention center. Is that what you call it?

A. Federal records center.

Q. And where is that—New Jersey?

A. There's one in New Jersey and there's one in Massachusetts. I'm not sure which one it would have wound up in.

Q. Is there one in Albany?

A. Not that I'm aware of, no.

Q. And ordinarily do you know where records from the Southern District grand jury investigations end up, whether it's in Massachusetts or New Jersey or any other place?

A. I believe if they—The records are shipped from the U.S. attorney's office, they wind up in Newark, New Jersey. If we send the records because we took possession of them from Albany, I believe they go to Massachusetts.

Q. And who determined that these records should go to Albany, rather than Massachusetts or Newark?

A. My group manager.

Q. What was the purpose of placing them in Albany at that time, if you know?

A. We were running out of room in Newburg.

Q. Why didn't you throw them away? Why did you put them in Albany?

A. Well, as far as I know, our procedures are never to throw records away. At least we're not authorized to do that.

Q. Then running out of room isn't the answer. I mean why were they sent to Albany in particular as opposed to any other place?

A. Well, twofold. One, we didn't have the space and, secondly, they were no longer needed by us at that time so if the records were going to be utilized for any civil purposes they could be obtained in Albany.

Q. Did you expect that they might be used for civil purposes?

A. Possibly.

Q. Did you have a civil function at that time?

A. No.

Q. So you were thinking in terms of the eventual civil use that

might be made of the records?

A. Only because there had been a cooperation agreement effected between the defendants and the government.

Q. The answer is yes?

A. Yes.

Q. At that time that the records were brought to Albany, do you know who the owner of the records was?

A. I have no idea.

Q. At any time after the grand jury investigation concluded, did you communicate with the banks with regard to whether or not they wanted the records returned?

A. No.

Q. Did you communicate with any of the banks with regard to whether or not they gave you their permission to remove the records outside the judicial district?

A. No.

Q. Was there ever a decision made by you or anyone else within your group or within the CID not to return the records to the bank?

A. No.

Q. What would you have done if one of the banks had contacted you and asked to have the records sent back to them?

A. Well, to begin with, the banks were paid for those records.

Q. They were paid for the copying?

A. They were paid for the records, so much for their service and so much for each copy because it's microfilm. They're not original documents.

Q. So therefore the answer would be, I assume, that you would not have returned them?

A. You're asking me what my position is. My feeling is that we own the records. We paid for them.

Q. Who is "we?"

A. The government.

[Colloquy omitted]

BY MR. SCHARF:

Q. On December 22nd of last year you again went to get those records out of wherever they were stored in Albany, the Leo O'Brien Building—

A. I did.

Q. At whose request?

A. Mr. Sterner's.

Q. Did you consult with anyone in the U.S. attorney's office that that would be okay?

A. No.

Q. And there was no 6(e) order at that time to your knowledge, was there?

A. No, sir.

Q. You stated that on December 22nd when you removed the records from the basement storage area to the CID office upstairs, you provided an inventory list to Mr. Sterner, is that correct?

A. I think I placed them in plain folders and labeled the folders what they were. In other words, Chase Manhattan Bank and the account number.

Q. Do you recall when Mr. Sterner asked you to come up to Albany and look for the records?

A. Two days prior to that, I believe.

Q. Less than a week before December 22nd?

A. I would say so.

Q. What if he had asked you to do that in August of '85? Would you have given him the records then?

A. In August of '85?

Q. Yes.

A. I suppose so.

Q. At what point did district counsel's office have the authorization to ask you for the records?

MR. STERNER: Objection, Your Honor. It would be speculation on—

MR. SCHARF: I withdraw the question.

BY MR. SCHARF:

Q. When you brought the records up from the basement to CID, what floor is CID on?

A. They're now on the fifth floor, I believe.

Q. And when you did that, did you separate the records of Chase Manhattan Bank from the other bank records?

A. They were re-separated in the exhibit folders.

Q. Did you bring all three bank records to CID on that date?

A. I brought all the boxes up because I couldn't recall which box the records were in. I opened them all and when I found the box that contained those records then I pulled them out and extracted

the one Mr. Sterner needed.

Q. That included the records from three different banks?

A. I believe so, yes.

Q. And where were the records kept in CID?

A. After I extracted them?

Q. Yes.

A. I put them in a separate box, closed that box and left it with the secretary there and instructed her that Mr. Sterner or someone from his office would be calling for them.

Q. And did that separate box contain records from all three of the banks?

A. Yes.

Q. And no effort was made to separate the Chase records from the records for City Bank and CBT?

A. I don't believe so, no.

Q. What did you do with the rest of the grand jury material after you removed the three banks' records?

A. I resealed the boxes and instructed the tax fraud investigative aide to bring them back down to the storage room.

Q. Back in the summer of '87, approximately in August, did you have any telephone or other converstions with either appeals officer Bernard Sherman or revenue agent David Prystal?

A. I may have had a conversation with Prystal when he asked me for the SARs and some other documents, and I advised him that everything in connection with the Mycek and DiLeo matter was grand jury material and the only thing he would be entitled to would be public record information, such as the indictment or a transcript of the pleading, things like that, but certainly nothing that had been gathered by subpoena.

Q. Did you see his entitlement to those records as being any different from Mr. Sterner's entitlement to those records four months later?

A. Not really.

Q. Yet when Mr. Prystal asked you for the records, you told him no, and when Mr. Sterner asked you for them four months later you told him yes?

A. Mr. Sterner explained to me that it was their office's view that they could accept the records under certain circumstances, and he explained those to me and I agreed.

Q. What if Mr. Prystal had said the same with regard to the view of the examination division?

A. I think I would have conferred with counsel.

Q. That's reasonable.

THE COURT: The legal profession certainly does stick together, no matter what.

Q. When you removed the records in the CID office on the fifth floor and you took out the package and left everything else, did that everything else include memorandums of interview?

A. Yes.

Q. Affidavits?

A. Yes.

Q. Did it include any bank records or any bank accounts kept by Luxolamp Corporation?

A. No.

[Colloquy omitted]

BY MR. SCHARF:

Q. Who is the person at CID in Albany who had custody of the records after December 22nd?

A. That would have been the secretary of one of the groups.

Q. And was he on the 6(e) list?

A. It's a she.

Q. Was she on the 6(e) list?

A. No. Excuse me. I may have misspoken. That person could well have been.

Q. You don't know if—

A. I don't know whether she is or not.

Q. When you were requested by Mr. Sherman, I think you said, to supply information that I had requested of him, did you consider whether or not the memos of interview and affidavits were grand jury material?

A. I didn't say Mr. Sherman, I don't believe.

Q. I'm sorry, who was it?

A. I think I had a conversation with Mr. Prystal when he was assigned to this matter and he asked me what the case was about and I said it was a grand jury case, I could not discuss it. He asked me what information I could provide and I said only public information.

Q. Did you provide any memos of interview or affidavits to

Mr. Sterner?

A. No.

Q. You just gave him what he asked for.

A. Exactly.

MR. SCHARF: No further questions.

MR. STERNER: Just one, Your Honor.

BY MR. STERNER:

Q. Mr. Kirschen, at the time you left the records at the main office of the criminal investigation division waiting for my call, was anyone authorized to look through those records?

A. No, and they understood what was in them.

MR. STERNER: Thank you.

THE COURT: You may step down.

(witness excused.)

APPENDIX K

TAX COURT EXHIBIT 25-Y

THE CONNECTICUT BANK AND TRUST COMPANY, N.A.

Law Department
One Constitution Plaza
Hartford CT 06115-1600
203 244-6167

Kathy Kelly

Vice President

FEDERAL EXPRESS
December 21, 1987

Christopher B. Sterner, Esq.
Acting District Counsel
Internal Revenue Service
North Atlantic Region
Leo O'Brien Federal Office Building
Clinton Avenue and N. Pearl Street
Room 826
Albany, New York 12207

RECEIVED
DEC. 23, 1987
ALBANY DISTRICT
COUNSEL OFFICE

Re: Joseph R. and Mary A. DiLeo, et al

Dear Attorney Sterner:

I am writing to you concerning the subpoena which was recently served on our Bank in the above-referenced matter. It is my understanding that in conjunction with a Grand Jury Subpoena issued by the United States District Court, Southern District of New York concerning the investigation surrounding Walter Mycek, Jr. and Joseph R. DiLeo, we have already produced and provided these same records. Therefore, I am authorizing you to review these documents in lieu of our reproducing these documents a second time.

If you have any questions, please feel free to contact me.

Sincerely,

Kathie Kelly

APPENDIX L

TAX COURT EXHIBIT 26-Z

Citibank, N.A.
A subsidiary of
Citicorp

399 Park Avenue
New York, NY
10043

RECEIVED
DEC. 24, 1987
ALBANY DISTRICT
COUNSEL OFFICE

December 21, 1987

Christopher B. Sterner
District Counsel
Internal Revenue Service
North-Atlantic Region
Lew W. O'Brian Federal Office Building
Clinton Avenue & N. Pearl Street
Room 826
Albany, NY 12207

Ref. No. 1540-87R, 3698

Re: Subpoena served on Citibank N.A. for the production of records relating to accounts for Arcelo Reproduction Co. Inc. for the period 1977 through 1983

Dear Mr. Sterner:

This is in response to the above subpoena.

Pursuant to your request for material provided to the Grand Jury Subpoena on 5/6/83 relative to Arcelo Reproduction Co. Inc. Ref #363-83B; we give you authorization to obtain these records to facilitate your subpoena dated November 17, 1987 a copy of which is enclosed.

Please let us know if we may be of further assistance.

Very truly yours,

Helen L. Price

Helen L. Price
Manager
Subpoena Compliance Unit

APPENDIX M

TAX COURT EXHIBIT 27-AA

The Chase Manhattan Bank, N.A.
1 Chase Manhattan Plaza
New York, New York 10081
Telephone (212) 552-6732

Lynne H. Federman
Vice President
Senior Associate Counsel

January 4, 1988

VIA AIRBORNE

District Counsel

IRS
Leo W. O'Brien
Federal Building
Clinton Avenue and
North Pearl Street
Albany, New York 12207

RECEIVED
JAN. 5, 1988
ALBANY DISTRICT
COUNSEL OFFICE

Att'n: Christopher Sterner, Room 826

Re: Arcello Reproduction Inc.

Dear Mr. Sterner:

In connection with the Tax Court subpoena served by the IRS upon The Chase Manhattan Bank, N.A. ("Chase") on December 7, 1987, this letter constitutes Chase's consent and permission to the IRS to obtain the records Chase had already produced to the Grand Jury in the Southern District of New York in response to a Grand Jury Subpoena. The records were produced prior to 1984 in connection with the Grand Jury's investigation of Arcello. It is our understanding that the records were to be returned to Chase at the conclusion of the Grand Jury proceedings, but this has not yet occurred. Instead of sending the records to Chase and Chase then forwarding them to you, you have Chase's consent to obtain them directly from the possession of the Criminal Investigation Division.

Sincerely yours,

Lynne H. Federman

Lynne H. Federman

Supreme Court, U.S.
FILED
AUG 26 1992
OFFICE OF THE CLERK

No. 92-163

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH R. DILEO, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

CHARLES E. BROOKHART
KENNETH W. ROSENBERG
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether financial records that previously had been the subject of a grand jury subpoena were properly admitted into evidence in the Tax Court.

2. Whether an IRS agent who assisted at grand jury proceedings was ineligible to assist at the Tax Court trial.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2A-11A) is reported at 959 F.2d 16. The opinions of the United States Tax Court (Pet. App. 18A-54A, 66A-80A) are reported at 96 T.C. 858 and 58 T.C.M. (CCH) 304. The opinion and order of the district court (Pet. App. 57A-63A) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1992. The petition for rehearing was denied on April 28, 1992 (Pet. App. 1A). The petition for a writ of certiorari was filed on July 27, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Commissioner of Internal Revenue issued statutory notices of deficiency to petitioners for their 1978 through 1982 income tax years (Pet. App. 67A). Petitioners sought redetermination of the deficiencies in the Tax Court (*ibid.*). The Tax Court consolidated the cases for a trial to be held in January 1988 (*ibid.*).

One month prior to trial, the Commissioner served trial subpoenas *duces tecum* upon three banks, seeking production of all books, records or other documents pertaining to certain of petitioners' accounts during the period of the alleged deficiencies (Pet. App. 74A). These same records had previously been subpoenaed by a federal grand jury during a criminal investigation in 1984. That investigation led to the indictment of two of the petitioners (Joseph R. DiLeo and Walter E. Mycek, Jr.), who pled guilty to various tax-related criminal violations (*id.* at 67A-68A). After those criminal cases were closed, the subpoenaed records were not returned to the banks but were instead placed in storage (*id.* at 72A, 86A-87A). When the trial subpoenas were issued to the three banks in the Tax Court case, the banks authorized the IRS to retrieve from storage the records described in the subpoenas (*id.* at 94A-96A).

2. At trial, petitioners moved to suppress the subpoenaed records on the ground that they were obtained in violation of Rule 6(e) of the Federal Rules of Criminal Procedure, which limits disclosure of "matters occurring before the grand jury" (Pet. App. 75A). The Tax Court denied the motion, holding that the bank records obtained pursuant to the Tax Court trial subpoena were not "matters occurring before the grand jury" and were therefore not subject to the restrictions on disclosure of Rule 6(e) (Pet. App. 77A-79A).

Mycek and DiLeo then commenced a proceeding in federal district court to enjoin the Commissioner from using the subpoenaed bank records in the Tax Court trial (Pet. App. 60A). The district court declined to issue the requested injunction, holding that, under *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960), the bank records did not represent "matters occurring before the grand jury" (Pet. App. 62A). The court further entered an order pursuant to Rule 6(e) authorizing the subpoenaed records to be used in the Tax Court proceeding (Pet. App. 63A). Petitioners filed a notice of appeal from the district court's order, but the appeal was dismissed pursuant to a stipulation preserving petitioners' right to pursue the same issues in any subsequent appeal from the Tax Court case (*id.* at 5A).

The Tax Court thereafter issued an opinion (Pet. App. 18A-54A) and entered decisions (*id.* at 12A-17A) upholding the deficiencies found by the Commissioner. In its opinion, the Tax Court rejected petitioners' additional claim that IRS agent Kirschen, who was assigned to assist the United States Attorney's office and the grand jury in the criminal proceedings involving DiLeo and Mycek, should have been excluded from attending the Tax Court trial (*id.* at 53A).

3. The Second Circuit affirmed. Applying the rule of *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960), the court of appeals concluded that the bank records subpoenaed for the Tax Court case "clearly did not compromise the secrecy of the grand jury's deliberations" (Pet. App. 7A) and that their disclosure was not barred by Rule 6(e). The court held that, when information has been submitted to a grand jury, that does not bar its later use at a civil trial:

> [W]hen testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took

> place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

Pet. App. 7A (quoting 280 F.2d at 54). The records admitted into evidence in the Tax Court were sought for their own sake and did not reflect or represent "matters occurring before the grand jury" within the meaning of Rule 6(e) (Pet. App. 7A). Although the district court entered an order authorizing use of the bank records at the Tax Court trial (*id.* at 63A), the court of appeals concluded that no court order was necessary to permit the disclosure of the bank records pursuant to Rule 6(e) because the records did not reveal "matters occurring before the grand jury" (Pet. App. 8A).

The court of appeals further held that the presence of IRS Agent Kirschen at the Tax Court trial for the purpose of providing certified documents and hearing testimony to determine whether perjury had been committed did not violate the prohibition of Rule 6(e) against disclosure of grand jury matters (Pet. App. 10A).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. As petitioners acknowledge (Pet. 11), the courts of appeals have consistently looked to the test established by *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d at 54, in determining whether documents or other materials subpoenaed by a grand jury may also be obtained for use in civil cases. Under *Interstate Dress* (*ibid.*),

> when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful

> investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

Petitioners do not (and cannot) dispute that the bank records sought in this case were subpoenaed for the Tax Court trial because of their "intrinsic value" to that civil case and not to ascertain what transpired before the grand jury. Petitioners instead contend (Pet. 11) that *Interstate Dress* and the decision in this case conflict with decisions of this Court. That contention was correctly rejected by the court of appeals (Pet. App. 6A-7A).

Petitioners first assert that *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), conflicts with the rule of *Interstate Dress*. But *Sells Engineering* did not even address the question of what type of documents or other information constitute "matters occurring before the grand jury" for the purpose of Rule 6(e). Instead, *Sells Engineering* concerned whether Justice Department attorneys and their staff are permitted automatic disclosure of grand jury materials (pursuant to Rule 6(e)(3)(C)(i)) without any requirement of judicial authorization. See 463 U.S. at 420, 427-442. In determining that judicial authorization is required for disclosures to government attorneys "other than prosecutors" (*id.* at 435), the Court did not address, mention or decide what types of information would disclose "matters occurring before the grand jury" under Rule 6(e).

Petitioners also claim (Pet. 14) that the rule of *Interstate Dress* was rejected by *United States* v. *John Doe, Inc. I*, 481 U.S. 102 (1987). The question in *John Doe, Inc. I* was whether a government attorney to whom "matters occurring before a grand jury" have properly been disclosed in a criminal case must obtain judicial au-

thorization to use such materials "in the civil phase" of the dispute. *Id.* at 104. The court held that "Rule 6(e) does not require the attorney to obtain a court order before refamiliarizing himself or herself with the details of a grand jury investigation." 481 U.S. at 111. That decision obviates the need for the government attorney to distinguish between "matters occurring before the grand jury" and other sources of information obtained in preparing the civil litigation. *John Doe, Inc. I* does not, however, address what constitutes "matters occurring before a grand jury" and thus has no bearing on the issue presented in this case.[1]

b. Petitioners err in contending (Pet. 16-17) that the decision of the court of appeals conflicts with *In re Grand Jury Proceedings*, 851 F.2d 860 (6th Cir. 1988). In considering whether certain business records that had been turned over to a grand jury pursuant to a subpoena were "matters occurring before the grand jury," the Sixth Circuit stated in *Grand Jury* (851 F.2d at 866):

> We recognize that there may be situations in which information is sought coincidentally "for its own sake" independent of a grand jury investigation and thus do not implicate the secrecy concerns of rule 6(e). In *Interstate Dress Carriers*, for example, the documents sought under a 6(e) request were the sole copies of certain records sought by the Interstate

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[1] For the same reason, petitioners' reliance (Pet. 15) on *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979), is misplaced. That case concerned whether the court supervising the grand jury or the civil court that has jurisdiction over the proceeding for which specific grand jury information is sought is to rule on disclosures under Rule 6(e). See 441 U.S. at 213. *Douglas Oil* involved transcripts of grand jury proceedings (see *ibid.*) and thus did not seek to define the *type* of information to which Rule 6(e) applies.

> Commerce Commission; the company previously had turned them over to the grand jury.

The Sixth Circuit thus recognized that certain documents, by their nature, do not represent "matters occurring before the grand jury." The bank records involved in this case are such records. The information in those records is of the type ordinarily available by civil discovery—indeed, the banks that supplied the records authorized the production of those documents to the Internal Revenue Service in this case (Pet. App. 94A-96A).[2] Disclosure of these records would not reveal the nature, scope, or direction of the grand jury inquiry. See 851 F.2d at 867. As the court of appeals correctly concluded, the records "clearly did not compromise the secrecy of the grand jury's deliberations" (Pet. App. 7A) and did not constitute "matters occurring before the grand jury" within the meaning of Rule 6(e).[3]

c. Petitioners also claim (Pet. 12-13) that the analysis of *Interstate Dress* was repudiated by amendments to Rule 6(e)(3)(B) adopted in 1977. That contention is insubstantial. Rule 6(e)(3)(A) limits the disclosure "of

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[2] *Interstate Dress* held that "[d]ocuments produced pursuant to a grand jury subpoena remain the property of the person producing them * * * and their inspection by persons other than the grand jury and the prosecuting attorneys is therefore dependent upon the consent of the owner *or* upon a court order." 280 F.2d at 54 (emphasis added). As the court of appeals noted (Pet. App. 8A), the banks consented to the use of documents submitted to the grand jury to satisfy the subpoena in this case. Whether to comply with the subpoenas was a matter for the banks, rather than petitioners, to decide. *United States* v. *Miller*, 425 U.S. 435 (1976).

[3] Petitioners' invocation (Pet. 18-19) of the Right to Financial Privacy Act, 12 U.S.C. 3401-3422, is unavailing. That statute limits use of covered records, when subpoenaed by a grand jury, to the purposes authorized by Rule 6(e). See 12 U.S.C. 3420(a). The statute does not define, enlarge or restrict the scope of Rule 6(e).

matters occurring before the grand jury" (Fed. R. Crim. P. 6(e)(3)(A)). If such "matters are disclosed" pursuant to that Rule, then Rule 6(e)(3)(B) specifies that the "person to whom such matters are disclosed [under Rule 6(e)(3)(A)(ii)] * * * shall not utilize that grand jury material" for any reason other than the reason for which the disclosure was authorized (Fed. R. Crim. P. 6(e)(3)(B)). The "grand jury material" referred to in Rule 6(e)(3)(B) thus constitutes, by definition, the "matters occurring before the grand jury" that have been disclosed pursuant to Rule 6(e)(3)(A). Subpart (B) of Rule 6(e)(3) does not *expand* the definition of "matters occurring before the grand jury," as petitioner contends; instead, it describes the subset of such matters that have been disclosed by order entered under subpart (A) of the Rule. Thus, nothing in subpart (B) in any way alters or conflicts with the analysis of *Interstate Dress*, and, since the Rule was amended in 1977, no court has adopted petitioners' contrary claim.

d. Even if the bank records involved in this case constituted "matters occurring before the grand jury," the order of the district court validly authorized the disclosure (Pet. App. 63A). Rule 6(e)(3)(C)(i) permits the district court to authorize disclosure "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i). Moreover, even if use of the records had *not* been authorized by Rule 6(e), the remedy in such a case would be a finding of contempt against the individual violating the rule, not suppression of the evidence. The remedy of contempt is the sole remedy provided by Rule 6(e)(2).

2. Petitioners contend (Pet. 21-22) that the Tax Court improperly allowed IRS Agent Kirschen to be present at trial for the purpose of providing certified documents and hearing testimony to determine whether there was any reason to believe that perjury had been

committed. As the court of appeals correctly held in this case (Pet. App. 10A), a government employee may participate in the civil phase of a dispute without obtaining a court order under Rule 6(e). *United States* v. *John Doe, Inc. I*, 481 U.S. at 107-111; *In re Disclosure of Grand Jury Material*, 821 F.2d 1290, 1292 (7th Cir. 1987). Petitioners acknowledge (Pet. 21-22) that there is no basis for an assertion that the IRS agent disclosed grand jury information in connection with the Tax Court proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

CHARLES E. BROOKHART
KENNETH W. ROSENBERG
Attorneys

AUGUST 1992

FILED
SEP 23 1992
OFFICE OF THE CLERK

No. 92-163

IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH R. DILEO, MARY A. DILEO,
WALTER E. MYCEK, JR., MICHELE A. MYCEK
and ARCELO REPRODUCTION COMPANY, INC.

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioners Joseph R. DiLeo, Mary A. DiLeo, Walter E. Mycek, Jr., Michele A. Mycek, and Arcelo Reproduction Company, Inc. respectfully submit this brief in reply to the Government's Brief in Opposition.

ARGUMENT

A. The government's position relies solely on its assertion that *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960), is valid. Petitioners based their argument on statutes and decisions of this Court subsequent to *Interstate Dress* which make its rationale untenable. The government does not address these arguments. It relies instead on the correct assertion that this Court's decision in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), did not explicitly overrule *Interstate Dress*.

However, petitioners did not contend that *Sells* explicitly overruled *Interstate Dress*. Petitioners' argument was that *Sells* proceeds on the assumption that no grand jury information, regardless of its character (i.e. regardless of whether it is sought for its intrinsic value), may be disclosed without a court order. *Interstate Dress* analyzed disclosure only in terms of the five considerations for grand jury secrecy that were recognized by this Court in *United States* v. *Procter & Gamble, Co.*, 356 U.S. 677 (1958). In *Sells* and *United States* v. *John Doe, Inc. I*, 481 U.S. 102 (1987), however, this Court recognized another basis for grand jury secrecy: to prevent the grand jury's coercive powers from being used for civil or administrative purposes. *Sells*, 463 U.S. at 432-433; *Doe*, 481 U.S. at 114-115. Based in part on that rationale, the court in *Sells* refused to permit disclosure of "grand jury materials" to the government's civil attorneys without a court order. Thus, under *Sells*, the *Interstate Dress* analysis is obsolete.

This Court in *Sells* also recognized Congressional intent, and, indeed, Justice Department practice, to prevent government civil attorneys from having access to grand jury developed evidence for civil law enforcement purposes. This intent was found in the legislative hearings and reports in connection with the amendment to Rule 6(e) in 1977. The deputy attorney general testified before a House subcommittee that it would be a bad idea to allow agency personnel to use grand jury materials for civil purposes and that neither the proposed amendment nor current practice would allow such use. *Sells*, 463 U.S. at 439. The deputy attorney general then testified:

> *It would be the practice of the Department at the time to seek a 6(e) order from the court that that evidence could be made available for whatever civil consequence might ensue.*

Id. (Emphasis in *Sells* opinion.) This Court also quoted extensively from the Senate Committee Report. " 'Federal prosecutors' are given a free hand concerning the use of grand jury materials . . . but disclosure of '*grand jury developed evidence* for civil law enforcement purposes' requires a (C)(i) order." *United States* v. *Sells Engineering, Inc.*, 463 U.S. at 441-42 (emphasis added); *see*, S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 532 (civil use of grand jury developed evidence requires a court order).

This intent that underlay the 1977 legislation was made official the following year. In 1978, in the Right to Financial Privacy Act (12 U.S.C. 3401 et seq.), Congress extended the requirements of Rule 6(e), Federal Rules of Criminal Procedure, to disclosure of "financial records" when such records are "obtained from a financial institution pursuant to a subpena issued under the authority of a Federal grand jury." 12 U.S.C. 3420(a).

In light of these clear judicial, legislative, and even Department of Justice expressions, the reasoning of *Interstate Dress* is no longer valid. While it is true, as the government argues, that *Sells* did not overrule *Interstate Dress* explicitly, it was not petitioners' contention that it did. All petitioners argued was that *Sells* was one clear expression, among others, that *Interstate Dress* is no longer viable. The government has not addressed petitioners' real argument.

In *Sells*, this Court precluded the government's civil attorneys from obtaining "grand jury materials" without an order from the District Court pursuant to Rule 6(e). Now the government says *Sells* does not apply to documents that do not reveal what took place before the grand jury and that I.R.S. attorneys can determine on their own when they are entitled to receive disclosure of such documents. In essence, the government would re-write *Sells* and say it applies only to transcripts of testimony and whatever documents might reveal what took place before the grand jury. However, the "grand jury materials" involved in *Sells* were not conceptually different from the bank records involved herin.

The government also asserts that *In Re Grand Jury Proceedings*, 851 F.2d 860 (6th Cir. 1988), does not conflict with the decision of the Second Circuit in the present case. This is incorrect. The Sixth Circuit remanded a case to the District Court for reconsideration of the latter's disclosure order in light of the concern expressed

in *Sells* and *Doe* that the grand jury's coercive powers not be abused to further the government's civil discovery. 851 F.2d at 866-867.

Contrary to the government's assertion, the District Court's order herein did not authorize disclosure of the grand jury materials; those materials had already been disclosed years earlier. All the District Court purported to authorize was the "use" of the materials. (App. 63A.) However, nothing in Rule 6(e) empowers the District Court to authorize a "use" of grand jury materials. Furthermore, the records were not specified in the order (they were described only as "certain pre-existing documents" (*id.*)), and the required showing of particularized need for disclosure of grand jury documents was not made. *See, Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979). Moreover, the District Court did not perform a suppression analysis following its conclusion that the government had committed "egregious" violations of Rule 6(e). (App. 57A-62A.) For any of these reasons, the order was not sufficient.

B. The government contends that, absent proof by taxpayers of an actual improper disclosure, agents who previously assisted a grand jury, pursuant to Rule 6(e)(3)(A)(ii), may later serve as essential personnel for the government in a civil proceeding. Petitioners urge that it would be virtually impossible for the government's civil litigation opponents to prove that an improper disclosure was made to the government attorney, and therefore, a prophylactic rule is required that would prohibit (a)(ii) agents from participating in related civil proceedings. The Court recognized the need for such a rule in a similar context in *Sells*, 463 U.S. at 432.

The government bases its argument on *United States* v. *John Doe, Inc. I*, 481 U.S. 102 (1987). However, the logic of *Doe* does not apply to (a)(ii) personnel. The government attorneys in *Doe* received disclosure properly pursuant to Rule 6(e)(3)(A)(i) and did not disclose the information to anyone else. The non-attorney involved in this case, Special Agent Kirschen, also received the disclosures properly in the first instance, pursuant to Rule 6(e)(3)(A)(ii). However, he is precluded from disclosing the grand jury information based on Rule 6(e)(3)(B). The government could have used any other government agent as its essential person at the civil trial, and there would be no cause for concern about

improper disclosure. In *Doe*, it made sense to use the same attorneys in the criminal and civil cases in order to avoid the need for a new group of attorneys who would have to learn the complex case. As to (a)(ii) personnel, however, it is the intent of Rule 6(e) to require that new personnel, who are not familiar with the grand jury evidence, be assigned to the civil matter. *See*, Rule 6(e)(3)(B).

Where the (a)(ii) agent serves in a civil capacity, there is a potential for abuse, even if only in the form of a subconscious disclosure to the government civil attorney.* The government's civil opponents should not be required to prove that an improper disclosure actually was made. The mere presence of the (a)(ii) agent as an essential person in a civil trial undermines confidence in the strict controls that Rule 6(e) is intended to impose.

C. Finally, certiorari should be granted in this case because the issue is important and the law is unclear and susceptible to inconsistent applications. In this case, the government sought disclosure and argued that the records it sought could be disclosed without a court order as they are not "matters occurring before the grand jury." In other cases, the government's litigating opponents often request disclosure, and the government opposes disclosure based on the agrument that the documents sought are "matters occurring before the grand jury" and that a court order is required. *See, e.g., Federal Deposit Insurance Corporation* v. *Ernst & Whinney*, 921 F.2d 83, 87 n. 1 (6th Cir. 1990).

Indeed, in this very case, the government successfully opposed disclosure to petitioners of other bank records based on the argument that those bank records do constitute "matters occurring before the grand jury." (App. 5A, 59A-60A, 79A-80A.) Certiorari should be granted not only to resolve the conflict between the Sixth and Second Circuits, but to resolve the conflict in the government's own litigation positions.

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* Surely, improper disclosures had to have been made by the agent in order for the District Counsel attorneys to have known what they knew about the grand jury records. The civil attorneys knew that Special Agent Kirschen was the person with whom to communicate about the records and that they could direct him to travel to their office building in Albany to produce the records that he had stored there previously. (App. 83A, 89A-91A, 92A-93A.) They knew the banks did not possess the records and would consent to disclosure of the records which were located in the civil attorneys' office building. The civil attorneys could not have known this information from public documents in the criminal cases against DiLeo and Mycek.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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